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RENT RECOVERY ACT AMENDMENT BILL.

This Bill introduced by the Honourable the Acting Advocate-General into the local Legislative Council has met with opposition altogether unlooked for. The Bill appeared to us to be so little of a controversial character, that we expected it to be passed at one sitting of the Legislative Council without much discussion; and yet it has awakened an amount of interest in the "Madras Mail," and a keen opposition in the Hon. Mr. Crole which have necessitated a somewhat lengthy notice of the measure in these pages.

There is no tenancy law in this Presidency, nor has there been at any time since the commencement of the Regulations which marked the beginning of orderly government under British rule. There is no enactment specifying the character of the various tenures or the quantum of interest possessed by the holder of each tenure in the soil and defining the relations of the various tenure-holders *inter se* and to the Government. We have only a Rent Recovery Act defining the processes available to the landlord for the recovery of rent and the pre-requisites for the issuing of such processes. If an amendment were called for in such a law, either because the pre-requisites imposed certain hardships or resulted in certain loss to the landlord or the tenant, or because the processes were not sufficiently effective for the realization of rent, it stands to reason that such an amendment would have nothing to do with the definition of proprietary or tenancy right which would fall within the natural province of tenancy legislation. No doubt, if tenancy legislation were undertaken in a thorough-going spirit, the provisions with regard to the recovery of rent would form a fitting chapter of such a legislation. But it seems out of keeping with the framework of the Rent Recovery Act, as we have it, to introduce

into it provisions defining occupancy rights, or the mode of their acquisition; and yet the gravamen of the charge against the Bill appears to be that it has not attempted this incongruous task, and has thereby shown little tenderness for the interests of tenants sought to be protected by the opponents of the measure. It is absurdly enough suggested that the decision of the High Court in *Chokkalinga Pillai* v. *Vythilinga Pandara Sannadhi*, 6 M. H. C. R., 164, dealt a death blow to the rights of zemindari tenants which it is alleged to have been the policy of the Legislature to foster. Starting with this erroneous assumption the Hon. Mr. Crole has assailed the Bill with considerable vigour of language as perpetuating the erroneous and mischievous tendency alleged to be the result of that decision. But the decision in that case is one of the best considered and thoughtful decisions of the High Court of Madras, and though it has sometimes been misunderstood as pointed out by *Sir Charles Turner* in *Karpakambal Ammal* v. *Ganapathi Subbayyan*, I. L. R., 5 M., 234, it has always appeared to us to be a sound exposition of the law. The decision in *Chokkalinga Pillai's* case merely points out that the regulations do not confer any right of occupancy, and that such rights, whether based upon grant or custom or immemorial usage, continue unaffected by the regulation and have to be established or negatived according to the circumstances of each case. Indeed it has been pointed out in *Venkata Mahalakshmamma* v. *Ramajogi*, I. L. R., 16 M., 271, that the Zemindar suing to eject a tenant from the holding must show that the tenant came into occupation under him. It has also been held in two other cases (*Appa Rau* v. *Subbanna*, I. L. R., 13 M., 60, and *Venkatacharlu* v. *Kandappa*, *Ib.* 15 M., 95), that the Zemindar seeking to establish that he has the right to eject a ryot bears the burden of proving that he has the right. It seems, therefore, altogether unwarranted to assume that the decision in *Chokkalinga Pillai's* case has been departed from in letter or in spirit in subsequent cases, or that the decision is adverse to the rights, whatever they may be, of zemindari tenants. If under these circumstances, one should demur to the propriety of introducing any provision about occupancy rights in an Act whose scope is altogether different, he cannot run the risk of rendering himself obnoxious to the charge of sacrificing the interests of tenants. It is, moreover, no easy matter to define the modes of acquisition of occupancy

rights as regards various kinds of landed property and in the different parts of the Presidency. This Bill does not militate against the possibility of legislation as regards land tenures, and when such legislation is introduced, the provisions of this Bill will be found to be entirely in harmony with it.

Another charge equally serious against this Bill is that it prejudices the position of the tenant as the exchange of *puttah* and *muchilika* ceases to be a condition precedent to a suit for rent. The law on the subject already existing has been considerably misunderstood. A suit for rent is only cognizable by the Civil Courts, and Ss. 12 and 87 clothe the Civil Courts with full power to consider the propriety of the rates of rent in conformity with the provisions of the Rent Recovery Act. But a landlord is precluded from introducing a suit for rent, or from taking any proceedings under the Act, unless puttah and muchilika have been exchanged, or puttah has been tendered, or such exchange has been dispensed with. *Holloway, J.*, protested in the Full Bench case reported in *Gopalasawmy Mudelly* v. *Mukkee Gopalier*, 7 M. H. C. R., 312, against the construction of the Act which rendered the exchange or tender or the agreement to dispense with such exchange a condition precedent to a suit for the recovery of rent instituted in Civil Courts. But the majority overruled him, and the result of that decision has landed us in a state of things which is positively disgraceful to the administration of justice. The tender of puttah should be within the fasli itself, and the puttah tendered should be a proper one. If a puttah defective in any of the numerous stipulations ordinarily contained in it were tendered within the fasli and the error being rectified, an amended puttah was tendered after the expiry of the fasli, such a tender is no good. Again, if a landlord sues for rent undoubtedly due and in arrear, having tendered a puttah defective in any respect, the whole suit has to be dismissed; and, although the courts may differ as regards this supposed error or defect in the puttah, the decision of the Court of last resort invoked by the tenant may end in the dismissal of the whole action. The landlord may go to the Revenue Court to compel the tenant to accept a puttah, and the question in dispute between them, however trivial, may become the subject of adjudication by three Courts in succession, the litigation lasting several years, the

landlord paying the peishcush due to Government out of his pocket, and the puttahs tendered by him during those faslies in accordance with his own original puttah or in the amended form as settled by the Court of first instance or Court of Appeal becoming useless in consequence of the decision of the court of last resort imposing a further term or making a new modification. This state of things which has been the source of great loss to many a landlord in the country has been crying aloud for legislative interference for many years, and when the first helping hand is stretched out to them, the cry is raised that this is class legislation bolstering up the rich and bringing ruin to the poor. We have been astonished at the callousness of our legislators and in no other country would this have been possible. The Revenue Courts have no jurisdiction to decide suits for rent and nothing is taken away from them by the Bill to be given to the civil courts. If under the law as it stands at present, the landlord and the tenant agreed to dispense with *puttahs* and *muchilikas,* they would be in the same position as regards the institution of suits of rent as this Bill would place them in without such agreement. In both cases the Civil Courts possessing the jurisdiction could determine the correctness of the amount claimed in accordance with the rules contained in the Act. If the exchange of puttah and muchilika be such a valuable aid to the tenant and a check against the rapacity of the landlord as it is alleged to be, there is no danger of its falling into desuetude, as the summary remedy provided by the Act, such as distraint or sale of defaulter's interest could only be had recourse to if the pre-requisites to be had under the Act be complied with; and the landlord is not likely to overlook the advantage of such remedies, as these are more expeditious than going to the Civil Courts for a decree for rent which has to be executed again against the property of the defaulter, while the peishcush payable out of the rents of the properties has to be paid by him to Government within the fasli. The tenant again if he is particular about the tender of a puttah is not without his remedy, for he can institute a suit under the Act after a demand as soon as the fasli commences to compel the landlord to deliver a puttah.

We have hitherto assumed that the exchange of puttah and muchilika is a very valuable privilege of the tenant; but we fail

to see how it is. No such exchange is necessary under the Bengal Tenancy Act, a piece of legislation which was considered for several years in the Supreme Legislative Council and evoked the keenest criticism on the part of wealthy Zemindars in that province; and even where such exchange is necessary under the earlier Tenancy Legislation of Bengal, Act XI of 1859, it was no condition precedent to a suit for rent in the Civil Courts. It certainly appears to us that we may well follow the leading of Bengal in this matter. A great deal too much of importance has been attached to the exchange of puttah and muchilika. The only explanation of this frame of mind appears to be that too long familiarity with this state of things in this province has disabled some people to judge dispassionately whether the system under which we have lived is necessary for the well-being of the people. There is no transfer of any jurisdiction from the Revenue Courts to the Civil Courts under this Bill, and even if there were, the advantage will certainly be in favour of the stationary Civil Courts as against the peripatetic revenue tribunals as it has been found by experience in Bengal; for, each successive legislative attempt there has been in favour of restricting the jurisdiction of the Revenue Courts and of expanding that of the Civil Courts until at last Civil Courts have acquired exclusive jurisdiction.

It has been said that the introduction of this Bill is an experiment in piece-meal legislation. Such critics seem to be altogether unaware of the mode in which legislation comes into existence in England. A hundred enactments could be instanced to show that where a particular evil was found to require a remedy, it was at once supplied without waiting to see whether a searching enquiry would bring to view other evils on which people might be more or less agreed. A great English case *Derry* v. *Peek* was decided by the House of Lords, and they ruled that no action lay on the part of a shareholder for damages, because the promoters through carelessness had made certain representations which were untrue, but which they believed to be true as to their powers under the statute incorporating them. A Bill was at once introduced to render such careless representation actionable and the Bill was passed into law within a few months after the decision. Was it objected to this legislation that it only related to the reckless representations of promoters of companies and that it did not relate to other careless

representations by other persons or bodies? No; and the simple reason is that those that favoured the new law and those that opposed it knew perfectly well that if legislation was always to be in comprehensive Codes and not to remedy particular abuses, society might groan under many evils for many a day.

There is another important provision in the Bill repealing that most objectionable provision in S. 10 of the Act rendering the tenant liable to eviction if he does not comply within ten days of the judgment of the Revenue Court requiring him to accept the puttah. There is no justification for this extraordinary penalty and the landlord is not similarly punished for default in tendering the puttah. We move so slowly in this country that such a provision has remained in the Statute Book for more than thirty years without inviting any comment or criticism from those that have been charged with the enforcement of this law.

The opposition of the Hon. Mr. Crole has delayed the passing of this Bill for another session; and the periodical movement of the Government to the Hills has interposed another period of six months before the Bill can be taken into consideration. The masterly speech of the Honourable the Acting Advocate-General has exposed every specious argument advanced against the measure. Notwithstanding the threatening attitude assumed by Mr. Crole, we hope, he will more dispassionately consider the measure in the light of the arguments and explanation afforded in its favour by the mover, and lend the measure the weight of his valuable support. In the meantime many a landlord will have lost another year's rents with the help of those technical devices which the law, as it stands, has placed within the hands of tenants.

A HINDU GUARDIAN'S OBLIGATION TO MARRY HIS FEMALE WARD.

I propose to examine in this article the nature and the extent of the obligation of a Hindu father or guardian to get his daughter or ward married. For satisfactorily deciding the question it becomes necessary at the very outset to enquire whether marriage is necessary for, or optional with, women of all the four classes.

As for women of the Sudra class it is easy to see that in their case marriage is entirely optional. The texts of the *Smritis* which lay down that marriage is a *samskāra* (purifying ceremony) necessary to be performed to effect the complete regeneration of the three twice-born classes do not apparently apply to *Sudra* women. Manu says: "With holy rites, prescribed by the Vedas, must the ceremony on conception and other sacraments be performed for *twice-born men* which sanctify the body and purify (from sin) in this life and after death." (Manu, chap. II, 26.) After naming and defining the various sacrifices enjoined by the Vedas, Manu closes the portion of the chapter relating to sacraments thus: "Thus has been described the rule for the initiation of the *twice-born*." (Manu, chap. II, 68.) Another argument for holding that marriage is entirely optional with Sudra women is afforded by the text of Brihaspati which says that women not married within the time allowed by the shasters become *Vrishalis* (Sudra women)—a consequence which need not alarm a Sudra woman.

As for women of the three regenerate classes, the question whether marriage is in their case obligatory or optional does not appear to be free from difficulty. A large number of texts from various *Smriti* writers appears to lay down that marriage is an indispensable sacrament. Manu says: "Reprehensible is the father who gives not his daughter in marriage at the proper time." (Manu, chap IX, 4.) Narada says: "Let no maiden suffer the period of maturity to come on without giving notice of it to her relations. Should they omit to give her in marriage, they would be equal to the murderers of an embryo. Therefore, a father must give his daughter in marriage as soon as the signs of maturity become apparent. Otherwise he would commit a heinous crime. Such is the rule settled among the virtuous." (Narada, chap. XII, 25 and 27.) Brihaspati says: "A father who does not give his daughter in marriage in proper time deserves contempt and shall be punished as ordained by law." (Brihaspati, chap. XXIV, 3.) But all text-writers are also agreed, on the incapacity of women to recite Vedic mantrams and join in placing the marriage of women on the same footing with that of Sudras. It appears rather to follow that marriage is the only one of the many sacraments *permitted to*, and not *enjoined upon*, women and Sudras. Mr. Bhattacharji also

says that marriage is the only sacrament permitted to women and Sudras, although he relies on no authority in support of his position. Anyhow the mentioning of Sudras and of women in the same breath in respect of marriage is a clear indication that marriage cannot be more necessary in the case of the latter than in that of the former. It has never been seriously contended that Sudras are under an obligation to marry and it appears to follow as a matter of logical reasoning that women too are under no obligation to marry.

A second argument in favour of the theory that marriage is optional with women is afforded by the texts of Manu, Brihaspati and Narada. These *Smriti* writers recognize distinctly the existence of a class of female ascetics. Manu says: "He who secretly converses with such women or with female slaves kept by one and with *female ascetics* shall be compelled to pay a small fine." (Manu, chap. VIII, 363.) Narada says: "Daughter, spiritual teacher's wife, *sagotra* relation, one come to him for protection, a queen, a *female ascetic*, a nurse, an honest woman, and a female of the highest class; when a man carnally knows any one out of these women, he is said to commit incest." (Narada, chap. XII, 74 and 75.) Vishnu also speaks of the crime of having illicit intercourse with *female ascetics*. (Vishnu, chap. XXXVI, 7.) The absence of any indication of contempt in these texts referring to *female ascetics* shows that *female ascetics* as a class were recognized and respected—a circumstance not consistent with the theory which makes marriage obligatory on women. It must be remembered that the *Smritis* do not any where prescribe the life of an ascetic for widows, and it, therefore, follows that female ascetics here referred to are women who had not married.

Another argument in favour of this view is furnished by the long array of disqualifying circumstances, enumerated in every *Smriti* writer of note as rendering a woman absolutely ineligible for marriage. The course of decisions of the various High Courts has, indeed, led us to regard most of these prohibitory injunctions as mere recommendatory observations, or at the best, precautionary suggestions the disregard of which would not invalidate a marriage once performed. But none the less the strong language in which these prohibitions are conveyed, the apparently sound reasons on

which many of them are sought to be supported, and the dreadful consequences, both temporal and spiritual, which the disregard of these prohibitory injunctions are asserted to entail, make it abundantly clear that in the view of the authors of the various *Smritis* these injunctions were intended to be more than directory. How then could the *Smriti* writers have made marriage compulsory in the case of women consistently with imperatively commanding men not to marry women subject to disqualifications from all of which the majority of womankind are not free? The prohibition to marry girls or women subject to any of the numerous disqualifications enumerated in the *Smritis* would be reasonable only if marriage were regarded as optional for women.

Another argument is afforded by the texts of Manu and Narada. "Three years let a damsel wait though she had attained puberty, but after that time let her choose for herself a bridegroom of equal caste and lineage. If, not being given in marriage, she herself seeks a husband, she incurs no guilt, nor does he whom she weds." (Manu, chap. IX, 90 and 91). "If no such person (competent to give) be in existence, let the maiden have recourse to the king and let her with his permission betake herself to a bridegroom of her own choice." (Narada, XII, 22). If marriage before puberty were compulsory for women, it is impossible to see how a woman unmarried even after puberty incurs no guilt. Th text of Brihaspati quoted in the previous portion of this article unequivocally lays down that a woman unmarried even after puberty becomes immediately a Sudra woman and the man who marries becomes a Sudra also. Again, why should the woman or girl wait three years after puberty? If marriage before puberty was commanded in the case of women, why should she not be permitted to choose a husband for herself immediately after she attained puberty? Why should she report herself to the king and obtain his permission to marry? Why again did the *Smriti* writers who took care to lay down that the girl should wait three years after attaining puberty say nothing as to the time *within which* the girl *should* seek a husband for herself? What was the girl to do if the king for reasons of his own did not permit her to choose a husband for herself? According to the *Smriti* writers the probable age at which a girl attains puberty is twelve and she is commanded to wait three years after

that period before seeking a husband for herself. In the light of the texts above quoted, it appears that marriage is optional for women, that the father, brothers, &c., have the power to give his daughter or sister in marriage till she reaches the sixteenth year, and that she might choose a husband for herself after that period. The daughter is by *Smriti* writers regarded as the *property* of her father, disposable in marriage so long as she continues to be a minor, but having a will of her own and liberty to act in accordance therewith when she reaches the sixteenth year, the age of majority according to *Smriti* writers. Except on such a view it is not easy to explain why a girl should be given no power to give herself away in marriage till she passes her fifteenth year and why there is no limitation in respect of time for her choosing a husband for herself after that period. As the texts read, a girl cannot give herself in marriage until she passes the fifteenth year, although her guardians had neglected to get her married before puberty; but after the completion of the fifteenth year, she could seek a husband for herself with the king's permission and (I add) if she found one she may marry him at any time after her sixteenth year.

An implied permission to abstain from marriage is also apparently given by the highly eulogistic terms in which the authors of *Smritis* speak of a life of celibacy. The texts, no doubt, refer to males, but the reasons given for preferring a celibate life apply with equal force to women also.

A positive permission to marry or abstain from marriage is also given by Harita who distributes women into two classes—*Brahmavadhinyah* and *Sadhyovadhvah* (those who lead a life of celibacy and those who lead a married life). This division of women into two classes is a clear proof that marriage is optional for women. Yama says that this classification of women has reference to the state of things in former Yugas, and that the text of Harita is not applicable to the Kali Yuga. Yama does not rely upon any authority and offers no reasons in support of his limitation. He apparently bases it upon the fact that in the Kali Yuga the text of Harita on this point is not honoured by observance.

One strong argument usually advanced against treating marriage as optional for women of the regenerate classes especially is

the fact that Hindu fathers from time immemorial have invariably got their daughters married. It is contended that, although a few texts of some ancient writer may be unearthed and proved to make marriage a matter of option for women, the long-established custom of the Hindu women being invariably to marry overrides the written law and renders the authority of those texts utterly useless. The objection at the first glance appears to have considerable force which, however, upon a little close examination vanishes. This objection requires one to concede that because no Hindu woman had ever chosen or was permitted by her guardians during nonage to remain unmarried, it is illegal for a Hindu woman to abstain from marrying. A similar proposition of law was contended for in *Upoma Kuchain* v. *Bholaram Dhubi* (I. L. R., 15 C., 708), but their Lordships of the Calcutta High Court held that the non-existence of a practice is no ground for regarding it as illegal. The rule of law laid down in that case clearly applies to the case before us. It was there held that intermarriages between subdivisions of the same caste were not invalid on the ground that such intermarriages had till then not been in vogue. If, therefore, it be conceded or established by argument that marriage under the law as contained in the *Smritis* is not compulsory for women, the mere fact that Hindu fathers and guardians had invariably from time immemorial been getting their daughters and wards married is no ground for holding that no Hindu woman should choose to remain unmarried. I have thus endeavoured to show that according to the law of the *Smritis,* marriage is not so much *enjoined* on, as it is *permitted* to, women, that it is optional with them to marry or to remain unmarried for life, that the practice or custom of Hindu women being invariably married cannot affect their right to exercise the option of remaining unmarried for life, and that so far as Sudra women are concerned, marriage is clearly optional. As however, I am not perfectly sure of this ground, I shall concede for purposes of argument that a Hindu father is under an obligation to get his daughter married and proceed to examine whether it is a moral or a legal one.

It is a hopeless task to pursue the ancient writers in their fine and verbose disquisitions on the characteristic differences between the various classes of injunctions and to come to a satisfactory

conclusion as to the tests by which a particular injunction contained in the *Smritis* was intended to be merely recommendatory, morally binding or legally obligatory. This difficulty is considerably aggravated by the fact that in the Sanskrit language in which these *Smritis* are written the same form of verb is indifferently used to express an inviolable command, a mere wish, or even permission. But a close and intelligent examination of the manifold injunctions in the various *Smritis* affords one test which can be applied with the smallest chance of error. Three sets of injunctions are invariably found in all the *Smritis*. Obedience to one set of these is alleged to secure immense spiritual reward, nothing being said of the consequences of their violation. The violation of another set of these is alleged to lead to spiritual degradation, nothing being said of the consequences of obedience to them. Of the third set, the violation leads to undesirable consequences of a temporal nature and subjects the offender to amercement, no good, either temporal or spiritual, being predicted in case of obedience. The first set of injunctions is merely recommendatory and can be disobeyed without the fear of incurring even any moral blame. The second set is also recommendatory in the sense that they are not legally obligatory, though morally binding. The third set alone gives rise to legal obligations and rights for which there is a remedy at law. The nature of the distinction between the second and the third set of injunctions according to this classification is recognized by the author of the Dayabhaga. In commenting on the verse of Manu which says: "To the unmarried daughters, let the brothers give portions out of their own allotments, respectively, according to the classes of their several mothers; let each give a fourth part of his own distinct share, and they who refuse to give shall be degraded," Jimutavahana argues that since degradation and not amercement is provided for if they refuse to give the allotment, the daughters have no legal right to a share. (Cole Dig. vol. II, p. 294). Judged by this test, the injunctions in respect of giving daughters and wards in marriage give rise to no legal obligations and rights and are merely moral precepts whose violation is an offence under the Moral Code only.

Again, if the obligation of a father or those named after him in succession to marry his daughter or their wards were a legal one,

to whom do they owe the legal duty? Is it to the society or the individual? It cannot be the former; for society has no means of enforcing the obligation. There is no remedy at law provided in that case; nor is the breach of the obligation to get the daughter or the ward married made indictable under the provisions of any penal code obtaining in the land. And as there can exist no legal obligation without a remedy for its breach under any circumstances, it cannot be said the father or other guardian is under a legal obligation to society to see his daughter or ward married.

Nor can it be maintained that the obligation is one which the father or other guardian owes to the daughter or the ward; for even here, the daughter or the ward has no means of enforcing the obligation. It is evident that the father or the guardian cannot be compelled, at suit of the daughter or the ward or somebody in their behalf to specifically perform his legal duty. It may, however, be contended that the Hindu law recognizes a remedy in that the father or the guardian may be compelled, on breach of this obligation, to defray the expenses of the marriage of their daughters or wards. But a close study of the *Smritis* shows that the father or the guardian is under no such obligation. Manu says: "Three years let a damsel wait, though she be marriageable; but after that time let her choose for herself a bridegroom of equal caste and rank. If, not being given in marriage, she herself seeks a husband, she incurs no guilt nor does he whom she weds. *A maiden who chooses for herself shall not take with her any ornaments given her by her father or her mother or her brothers; if she carries them away, it will be theft.*" (Manu, chap. IX, 90, 91 and 92.) Far from recognizing any right on the part of the daughter to recover her marriage expenses from the father the italicised portion of the text quoted clearly enjoins the daughter choosing a bridegroom for herself to restore to the father, mother and brothers any ornaments which she might have received from them before her marriage. Again Narada says: "Let a maiden be given in marriage by her father himself or by her brother with the father's authority or by her paternal grandfather or by her maternal uncle or by her agnates or cognates. In default of all of these, by the mother in case she is competent to act as guardian; if she be wanting in competence, the distant connexions shall give

a maiden in marriage. If no such be in existence, let the maiden have recourse to the king, and let her with his permission betake herself to a bridegroom of her own choice." (Narada, chap. XII, 20, 21 and 22.) Narada then branches off to another subject. Thus there is nothing here to indicate that the father or any other person on whom the duty devolves in succession is bound to defray the expenses of the marriage. Furthermore, Manu treats the daughter as the property of her father and the subject of gift. Manu says: "He who takes to wife a marriageable damsel, shall not pay any fee, to the father, for the father has lost his dominion over her in consequence of his preventing the legitimate result of the appearance of her menses, *i.e.*, in consequence of his not having married her before she attained puberty." (Manu, chap. IX, 93.) In support of the position that brothers are under a legal obligation to defray the marriage expenses of their unmarried sisters, reliance is often placed upon the following texts:—"To the unmarried daughters let the brothers give portions out of their own allotments, respectively, according to the classes of their several mothers; let each give a fourth part of his own distinct share; and they who refuse to give shall be degraded." (Manu, chap. IX, 118.) "The marriage and other ceremonies of unmarried daughters must be defrayed in proportion to the wealth inherited." (Vishnu, chap. XV, 31). A nuptial portion shall be given to unmarried daughters *out of their father's estate.*" (Devala.) "For any of the brothers whose investiture and other ceremonies had not been performed, the other brothers of whom the sacraments have already been completed shall perform these ceremonies *at the expense of the paternal estate;* and for unmarried sisters, the sacraments shall be completed by their *elder brothers* as the law requires." (Vyasa.) "For any of the brothers whose investiture and other ceremonies had not been performed by the father, those ceremonies shall be performed by brothers of whom the sacraments had been completed; and for their sisters by giving a fourth part of their shares." (Yajnavalkya, chap. II, 124.) "For unmarried daughters a fourth share is ordained and three shares for sons; but if the estate be small, a daughter is considered as having a right to a *sufficient portion, without determining the rate*" (Katyayana.) These texts are found, in the chapter on 'Inheritance' and 'Partition among brothers after

their father's death' in the *Smritis* from which they are respectively taken and it is therefore argued that the brothers are under a legal obligation to defray the marriage-expenses of their unmarried sisters. One objection that can be urged against this view is that the injunctions contained in all these texts are, as has been pointed out above, merely directory and not mandatory. If, for instance, the text of Manu, chap. IX, were held to contain a mandatory injunction, the effect of it would be, as is pointed out in page 294, vol. II of Cole, Digest, to deprive a son of all his patrimony where he has four unmarried sisters and to place him in a very unenviable position if he has five—a state of things hardly consistent with the pre-eminent position of the son in respect of his father's property unanimously conceded by all the Smriti-writers. These rules must, therefore, be understood as only recommendatory. Again these texts make it abundantly clear that the obligation, if any, imposed by them on brothers in respect of the marriage of their unmarried sisters is not an absolute but a conditional one. These texts agree in making the obligation not a personal one founded on the relationship of brother and sister, but one dependent upon the fact of the brother's inheriting assets from their father. The text of *Yajnavalkya* above cited is significant as clearly implying a distinction between the nature of the obligation of brothers to perform the investiture and other ceremonies of brothers and their obligation to perform the marriage of their unmarried sisters. While the former is made absolute and independent of any patrimony inherited by the brothers, the latter is made to depend upon, and vary in proportion to, the father's estate inherited. Narada is clearer than Yajnavalkya on this point : "To the eldest (son) a greater shall be given; a worse share is ordained for the youngest; the rest shall have equal allotments, and an unmarried sister shall also have a portion. For any of the brothers whose investiture and other ceremonies had not been performed by the father in due order, the other brothers shall perform those ceremonies at the expense of the paternal estate. Or if no property of the father remain, the investiture and other ceremonies must be performed out of their own shares by brothers for whom those ceremonies have already been performed." (Narada, chap. XIII, 13, 33 and 34). The omission of all reference to the unmarried sister in the latter portion of the passage just above quoted is a clear denial of all

obligation on the part of brothers in respect of the marriage of unmarried sisters, where the former have no assets of the father to inherit.

Now coming down to modern text writers on Hindu-Law and Usage, we find that they are silent on many of the points raised in this paper. They agree in speaking of the *duty* of the father to get his daughter married, but have nothing to say as to whether such a duty is a moral or a legal one, whether it is an absolute one solely resting upon the existence of the particular relationship, or whether it is dependent on the possession of property. Mr. Mayne in the chapter on Maintenance doubts whether the obligation to maintain is based upon mere relationship or is dependent also on the possossion of property (S. 409). He quotes a verse from Manu, which is not found in the translation of Manu in the Sacred Books of the East series, but found in Mandlik's Edition, p. 1347, and also cited in Mit, chap. II, 177. Even this verse refers distinctly to the *infant son* and not to the daughter. He also relies on West and Buhler, pp. 245 and 437, as showing that brothers are under a legal obligation to maintain and defray the marriage expenses of their unmarried sisters. The authority of West and Buhler again rests on the Smriti Chandrika, the only treatise on Hindu Law which makes the brother's legal obligation independent of the question whether the brothers had inherited assets from the father. The other texts relied on by West and Buhler have already been quoted and observed upon in this article. Mr. Bhattacharji, while conceding that there is no express text in Hindu law books laying down the legal liability of the father to maintain and marry his unmarried daughter deduces the rule from the passage of Mitakshara (Col. Mit. X, 13) which lays down the rule for the maintenance of the daughters of disqualified persons. He argues that the right of one's own daughters in this respect cannot reasonably be less than that of the daughters of his disqualified co-parceners. But the conclusion, I fear, is not warranted by the premises. The obligation of a person to maintain and marry the unmarried daughters of his disqualified co-parceners is evidently not based upon his relationship to the owners of the right, but upon the fact that their father is disqualified to inherit and therefore makes the co-parcener richer by the share of joint property to

which but for his disqualification he would be entitled. This is a reason why the daughters of disqualified co-parceners are justly entitled to greater rights than those of other co-parceners.

The case-law on the subject is also extremely meagre and unsatisfactory. There yet has been no case in which the legal liability of the father to maintain or marry his daughters was directly in issue. Much of the little case-law on the subject is directed to the question of the relative rights of guardians to dispose of the girl by way of marriage. There are also elaborate discussions as to whether the father owes a duty or is clothed with a right to marry his daughters; but whether the duty is a moral or a religious one, or whether it amounts to a legally enforceable obligation has never formed the topic of discussion. The only case where observations of Judges are found on this point is that of *Namasevayam Pillay* v. *Annammai Ummal* (4 M. H. C. R., 339). There their Lordships say: "It would seem from the express provision made by the law for the choice of a husband by a girl herself in case of neglect on the part of her relatives of their duty to betroth her for three years from the time she became marriageable (Manu, chap. IX, Sl. 90 and 91; 1 Strange's Hindu Law, 36), that the duty does not amount to an enforceable legal obligation." These observations were, indeed, unnecessary for the purposes of the judgment in that case; but, nevertheless, the reasoning appears to be sound enough. In *Mansha Devi* v. *Jiwan Mal*, I. L. R., 6 A., 617, the plaintiff claimed a sum of money against the defendant to meet the marriage-expenses of his unmarried daughters; but the court held that as no marriage had been celebrated or expenses incurred, the claim was premature. In *Tulsha* v. *Gopal Rai*, I. L. R., 6 A., 632, the plaintiff claimed a sum of money from the defendant in the matter of the marriage of the defendant's sisters, the defendant being admittedly in possession of his father's assets.

To sum up, it can without much hesitation be concluded that marriage is optional for women, especially of the Sudra class, that the father's obligation to marry his daughter is a moral duty, not legally enforceable, and that the obligation of brothers and others to marry their sisters and wards is conditioned upon their having inherited the assets of the father of the latter.

S. SITARAMA SASTRI.

INSANITY IN HINDU LAW.

Insanity as a juridical fact is taken notice of in all systems of jurisprudence, and it stands to reason that it should be so. As is said by a well-known writer on Lunacy, "there is found within the "State a class of persons who, though sharers in the common "humanity, can neither exercise the rights, nor perform the duties "of citizenship; who are more than other persons liable to injury "from themselves or others, yet are unable on their own behalf "to call for protection; who finally are more than others liable to "injure society, yet are neither amenable to its influence, nor "bound by its ordinary laws. Where the conditions are so pecu-"liar, the rules regulating them will be peculiar also. The absence "of reason creates in fact an elementary difference in the relations "of the individual to the State and the law of the State. Among "all the varied circumstances of life there is scarcely one but "is affected by it." Pope on Lunacy, (2nd Ed.), p. 5. We find, therefore, special laws made for this special class of persons in all systems of law.

Insanity is defined by the same writer "as a defect of reason consisting either in its total or partial absence, or in its perturbation," p. 1. Inasmuch as there are various degrees of perturbation of reason, and also various degrees in the partial absence of reason, English writers, both medical and legal, have divided insane persons in various and perplexing ways. And in English Law we find insane persons subject to disabilities, or possessing immunities in various departments of law, and a man may be insane for one purpose while he may not be considered to be insane for another. Thus in English Law.

i. An insane man is incapable of entering into a contractual relation. The test of insanity being whether the insane man was capable of understanding the nature of the act he was performing.

ii. An insane man may be incapable of making a will; the test being whether the testator had such memory as would enable him to know what his property was and who those persons were who were at the time the rational objects of his bounty.

iii. An insane man may not be responsible criminally. The test in this case being whether he was capable of knowing right from wrong.

iv. An inquisition in lunacy may issue; the test being whether the person is of unsound mind and incapable of managing himself and his affairs.

v. The insane man may be confined in an asylum; the test being whether the alleged lunatic is dangerous to himself or to others, and a proper person to be taken charge of and detained under care and treatment.

vi. The insane man may be incompetent to give evidence; the test is whether the lunatic is capable of understanding the questions put to him and capable of answering intelligently.

See Pope on Lunacy, p. 20.

In Hindu Law also we find the following classes of cases provided for:—

i. Insane persons and idiots are not competent witnesses. (See Vishnu, Ch. VIII, verse 2; Brihaspathi, Ch. 7, verse 30; and Manu, Ch. VIII, verse 67.

ii. Insane persons are not competent to contract. (Colebrooke's Digest Book 3, Ch. 3, S. II, verse 37.)

iii. It is also stated that a plaint or answer should be presented by a kinsman on behalf of madmen, idiots or the over-aged. (Brihaspati.)

iv. And, lastly, we have the well-known rules as to exclusion from inheritance:—Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage. (Manu, Ch. 9, v. 201.) An outcast and his son, an eunuch, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained without any allotment of shares. (Yajnavalkya, Ch. II, v. 140, Mandlik, p. 223.) Except the last, the other cases of disability are now regulated by statute, and the only cases of practical importance, which require to be decided by the rules

of Hindu Law, are those relating to exclusion from inheritance, and we propose to discuss them in the following order:—

i. What is the legal criterion of insanity or idiocy which excludes a person from inheritance?

ii. What is the effect of exclusion from inheritance as long as the excluded person is insane?

iii. What is the effect of the excluded person recovering his sanity?

And under the last head (*a*) when the person is excluded from a share in joint family property; (*b*) when the person is prevented from succeeding by inheritance.

Before proceeding further, we may here observe that the principle of exclusion on account of certain disabilities is not peculiar to Hindu Law; but we find similar rules laid down in other systems. In all early states of society where the communal form of property is prevalent, and where the idea of individual proprietorship is still unknown, or is yet struggling for recognition, where securing the property is more a matter of might than of right, we find this principle of excluding a feeble member of a family from participating in its property. Incapacitated persons are not useful for acquiring property for the family or for preserving it from the interference of strangers. For instance, we find it laid down in the Civil Law:—"Lunatics too, the deaf and the dumb, the incurably diseased, must have curators given them, for they cannot direct their own affairs. If a man is mad or a spendthrift and has no guardian, let his *agnates* and men of his *gens* have power over him and his money. (Hunter's Roman Law, p. 732.)

The following summary is given of the old Anglo-Saxon Law of Germany on this subject:—" Outcasts, illegitimate children, monks and nuns, one who has killed his father or other relative whose presumptive heir he is, or who has forcibly dispossessed him or robbed him of his property, these persons are entirely incapable of inheriting. Dwarfs, helpless cripples, persons of neutral sex, and lepers are equally disqualified, but their next of kin have the duty of maintaining them. The deaf, the dumb, the blind and the lame as well as those who have no hands or feet may inherit ordinary property." (See Jolly, p. 282.)

The modern Commission of Lunacy seems to have had its origin in similar rules of exclusion. Under the Common Law the Lord of the fee took possession of the estate of his insane tenant and provided him with necessaries. As this duty was not properly performed, the king took charge of the same. There was a distinction drawn between the estates of '*idiots*' and those of lunatics. The king had possession of the estates of the idiot and enjoyed the profits after providing for the necessaries of the idiot; while in the case of lunatics, he was only a trustee of the estate for the lunatic, and on his death, the profits were used for the benefit of his soul. (Pollock and Maitland's History of English Law, pp. 463 and 464, and I Blackstone, ch. VIII, p. 352, and 17 Edward II, Cc. 9 & 10.)

It must also be remembered that in English Law a person born deaf and dumb, or born deaf and blind was presumed to be an idiot. (Coke on Littleton, 426.)

Again, a conviction for felony or treason till recently corrupted the blood and prevented descent being traced from the convicted person and the property escheated to the Lord of the fee. (See Stephen's Criminal Law, vol. 1, p. 487.)

No doubt the harshness of these rules has been much softened in modern times in the other systems of law; but as the Hindu Law became stereotyped centuries ago, there has been no corresponding progress therein; and in interpreting and giving effect to the rules relating to exclusion this must be specially borne in mind.

I. Now coming back to the first division of our subject, we have to enquire what is the nature of the idiocy or insanity which works exclusion.

An idiot is defined in the Mitakshara as a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong; and it has been held that idiocy to work exclusion need not be total mental darkness. (*Tirumamagal Ammal* v. *Ramasvami Ayyangar*, 1 M. H. C. R., 214.) It is said that if the person is from his birth of such an unsound and imbecile mind as to be *incapable* of instruction, he is disqualified. (See also *Surti* v. *Narain Das*, I. L. R., 12 A., 530.)

Idiocy again is always congenital. A high authority on Medical Jurisprudence says, "idiocy is the *dementia naturalis* of lawyers.

The term idiot is applied to one who from original defect has never had mental power. Idiocy differs from the other states of insanity in the fact that it is marked by congenital deficiency of the mental faculties. (Taylor Med. Juris, vol. 2, p. 489) (3rd Edition), and Coke defines an idiot as he who from his nativity, by a perpetual infirmity is *non compos mentis.* (CoLitt 247a.)

The question whether a person is an idiot involves little difficulty in practice, though it is difficult to draw a clear line between an idiot and one who is only deficient in ordinary intelligence.

As to the case of insane persons there is some difference of opinion as to whether insanity also need be congenital. The Allahabad and Calcutta High Courts have now held that it need not be. (*Deo Kishen* v. *Budh Prakash,* I. L. R., 5 A., 509; *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye,* I. L. R., 8 C., 149; *Wooma Pershad Roy* v. *Grish Chunder Prochundo,* I. L. R., 10 C., 639. Also in an unreported case in Madras it was held that it need not be congenital; while in the case of *Gokul Das* v. *Parvati Bai,* I. L. R., 1 B., 177, *Westropp,* C. J., in discussing whether blindness to cause exclusion need be congenital, expressed a strong opinion that insanity also must be congenital. It may not therefore be out of place to see how far the opinion of the Bombay High Court is supported by the original texts or their commentaries. There is no text which affirmatively lays down that insanity should be congenital.(1) On the other hand, the text of Manu clearly implies that it need not be. He says, "*Anamshau kleebapathithou jathyandha badhirau thathah-Unmaththa jada murkhascha ye cha ke chinnirindriyah.*" "Eunuchs and outcasts, persons *born blind or deaf,* madmen,

(1) The texts from the leading Smritis are as follows:—

Yajnavalkya, Ch. II, V. 140. An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and [one] afflicted with an incurable disease are [persons] not entitled to a share; and are to be maintained.

Narada, Ch. XIII, V. 22. Persons afflicted with a chronic or acute disease or idiotic, or mad or blind or lame (are incapable of inheriting). They shall be maintained by their family; but their sons shall receive their respective shares of the inheritance.—Jolly.

Devala Cit Colebrooke :—On the death of a father *or other owner of property* neither an impotent man. . . . nor a madman, nor an idiot, nor one born blind, . . . shall take any share of the heritage. For such men . . . let food and clothes be provided, &c.

idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage." It will be observed that the word 'born' qualifies only the blind and the deaf and forms with them one compound word "*Jathyandha badhirau*" and the class *madmen* is not one of those qualified by the word 'born.' On the principle of *expressio unius exclusio alterius* (which is also recognized as a principle of interpretation in Hindu Law) it is inferable that madness need not be congenital.(2) In the text of Yajnavalkya the word 'born' is not used to qualify any of the classes of disqualified persons though in the translation of Colebrooke the word 'born' is introduced to qualify 'blind and deaf.' In the text of Narada as quoted in the Digest we have "insane, blind or lame from his birth" (Cole. Bk. V, Ch. V, Sec. 1, Vers. cccxx); according to this reading 'from his birth' qualifies 'insane' also. But Jagannatha also notices another reading of the same text 'idiot, insane, blind or lame' as found in *Vivada Chintamani*, though Jagannatha seems to prefer the former reading. Dr. Jolly has examined several manuscripts of Narada Smriti and in not one of them do we find the former reading, and he tells us that the former reading must be a mistake. Such a mistake could easily have been committed by a copyist, for though the sense is so much changed the variation in the reading itself is very little. Instead of '*Jadonmaththa*' as in the latter, we have '*Janmonmaththa*' in the former reading. We find also stated in the preface to the said Smriti that it is only an abstract of the Manu Smriti and the text of Manu rather leads to the inference that insanity need not be congenital, and it is unlikely that Narada would have introduced such an important change. Again, if the first reading is correct, Narada does not mention an 'idiot' '*jada*' as one of the disqualified persons. No doubt it might be said that an 'idiot' would be included in the class 'mad from birth,' but Sanscrit writers do make a distinction between madness and idiocy and use different words for that purpose, and there is no reason to suppose that Narada did not follow this and use the commonly used word 'jada' for an idiot.

On the strength of this doubtful reading of Narada, Jagannatha interprets 'Insane' 'as congenitally insane' in a text of Devala "... neither an impotent man ... nor a madman, nor an idiot, nor one (born) blind ... shall take any share of the heritage."

(2) See Smriti Chandrika, Ch. V, V. 30. Krishnaswamy Aiyar's Translation, p. 72.

He says 'a madman in the text of Devala signifies one insane from birth; for the import is the same with the text of Narada. Cole. Bk. V, Ch. V., Sec. 1, V. 326.

But Jagannatha too seems to think that even subsequent insanity would be a bar if it be ascertained to be the mark of a heinous crime.

Another reason for holding that madness need not be congenital is that both 'idiots' and madmen are mentioned in the texts as being excluded. Idiocy, we have seen, is always congenital, or at least one becomes an idiot owing to arrested development in the very early years of infancy, while madness is a disease affecting a healthy and well-formed intellect. The Mitakshara defines a madman as one affected by any of the various sorts of insanity proceeding from air, bile, phlegm, from delirium or planetary influence (Stokes H. L. p. 455, Mit. Ch. II, Sec. X, pl. 2), thus treating it as a disease; and Apararka defines *unmatta* as one afflicted with the illness *unmáda* (mania) cit. Jolly p. 275. We are not aware that 'madness,' strictly speaking, could at all be congenital; and if we wish to give any meaning to both the words in the texts, we are bound to take it that madness need not be congenital and means the disease which attacks a developed brain.

Again the reason stated by Hindu writers for exclusion is that the disqualified persons are not capable of performing religious rites, and that the heritage is the reward for the performance of such ceremonies. If so, one who is mad at the time of partition or when succession opens is equally incapable of performing religious ceremonies with one who has been so from his birth.

One argument may perhaps be advanced in favour of holding that 'madness' equally with 'blindness' and 'deafness' should be congenital, viz., that in the texts of Yajnavalkya, Narada, and Devela, all these are treated in the same manner, and the word 'born' is not used to qualify any of them; and as it is now held that blindness and deafness must be congenital, so also insanity should be. One obvious answer to this is that 'madness' is never congenital; another is that these Smriti writers are later than Manu, and they lay down the same rules as in that Smriti; and the qualification

"from birth" is introduced by the commentators on the authority of Manu.

It is unnecessary to refer to the cases in the Privy Council where it has been assumed that insanity need not be congenital to work exclusion (See *Baboo Bodhnarain* v. *Baboo Omrao*, 13 M. I. A., 519; *Kooer Goolab Sing* v. *Rao Kurun Sing*, 14 M. I., 176). A commentator of Manu (Narayana) has said that madness must be incurable. No other commentator has introduced this qualification, and the Allahabad High Court in the Full Bench Case already cited has held that it need not be incurable. I. L. R., 5 A, 509.(1)

Another question with reference to 'madmen' is the kind of 'madness' which disqualifies. As already stated what may be legal madness for one purpose may not be legal madness for another purpose. The test we would suggest is whether the 'insane person' is incapable of managing his affairs and to take care of himself and his property—in fact, the test adopted in English Law for the issue of a commission in lunacy. The original principle underlying the modern issue of a commission in lunacy and the principle of exclusion in Hindu Law as already noticed seem to be the same. In both the insane person was excluded from meddling with the estate and from the enjoyment of the profits. In both the insane person and his family were entitled to maintenance. In both after the disqualification ceased, the insane person was entitled to have the property back. No doubt under the peculiar system of tenure in England, the Lord of the fee, and afterwards the king as the superior landlord had possession of the disqualified person's estate; while in India the estate was given to the next heir subject to its being restored on the restoration of sanity. In both, the result sought to be obtained was the same, *viz.*, the preservation of the property intact to provide for the maintenance of the insane person and to keep it for his heir. No doubt there is some difference in the conception of the right of the insane in the different systems, and it has led to some difference in the legal conse-

(1) Professor Sarvadhikari is of opinion that insanity too should be congenital, for, he says in the text of Manu the word 'born' qualifies blind, deaf and insane as they all form one compound word and 'born' must qualify all the members of the compound. We quite agree that the conclusion of the learned Professor would be correct if the words blind, deaf and insane formed one compound word, but in the text of Manu they do not.

quences. For instance, in English Law the king was held to be the trustee of the estate of a lunatic (though not of an idiot) and was bound to account to the lunatic or his heirs, while the next heir in the Hindu Law is the owner of the estate as long as he is in possession. But the principle of both is the same, and it will be a safe guide to take the test in English Law in deciding on a man's insanity to exclude him from inheritance in Hindu Law.

As far as we are aware, the question has not been discussed in the reports or by text writers and in practice there is not likely to be very much of difficulty.

II. What is the effect of exclusion from inheritance as long as the disqualification lasts? It is laid down generally that the insane person is excluded from participation of the heritage. We have to bear in mind that an insane person may be disallowed a share on partition of joint family property, or may be excluded from succeeding to the property of a collateral or in the case of the Dayabaga Law to a lineal ancestor. The Hindu Lawyers do not often make a distinction between the two and the various texts which speak of exclusion generally refer to exclusion from a share of the heritage. The person who is excluded (as also his wife) is entitled to maintenance from the persons who take his share. His daughters too are entitled to maintenance till they are disposed of in marriage and to the expenses of their marriage.(1) Yajnavalkya mentioning the disqualified persons says they "must be maintained without any allotment of shares:—Their daughters must be supported so long as they be not disposed of in marriage; and their childless wives who preserve chastity must be supplied with food and raiment. Yajna, ch v. :—There can be no doubt that a member of a joint family who is unable to take his share on account of his infirmity is entitled to maintenance for himself, his wife and his daughters from the family property; for at the time of partition he is a member of the joint family and the maintenance of the members of the joint family who do not get or cannot get a share of the property has to be provided for in the first instance and only the remaining property could be divided among the sharers. (It must also be recollected that, under the early law, on a partition even the

(1) Whether the excluded person and others would be entitled to maintenance, &c., where he is prevented from succeeding *to a collateral*, is noticed later on.

female members were entitled to certain shares in lieu of their maintenance and this principle is still acted upon in some cases under the Bengal Law). The insane man does not in fact cease to be a member of the family.

Even under the Bengal Law the insane person and others have to be maintained out of his father's property (see the observations of *Norman, J.*, in *Callydoss Doss* v. *Krissan Chunder*, 11 W. R. Appeals from Original Jurisdiction, p. 11 at p. 12). Though the son does not acquire a right by birth in the father's property, he is still entitled to be maintained by his father, and when on the death of the father the son gets a share, the lesser right of maintenance is merged in the higher right. But if the higher right does not accrue owing to a disability the lesser right still subsists and the disqualified person is entitled to be maintained by those who take his share of the father's property.

But in cases where an insane person is excluded from succession to the property of a collateral, the person who actually succeeded to the exclusion of the insane man, would not be bound to give any maintenance to him or his wife or daughters; for in these cases the insane person had no right at all in the property of his collateral relation and the loss of his right to succeed could not create a new right to maintenance; while in the case of a joint family, and in the property of a father in Bengal, the members of that family and the sons respectively have a right of maintenance at the least; some of them have the further right to demand partition, or possess the right of participation. It is only this last right which is taken away by reason of a person being insane; and in consequence thereof the lesser right is recognized and given effect to. In cases of collateral succession on the other hand an insane person is simply considered to be non-existent and the inheritance goes to the heir next after him without any liability attaching thereto. The author of the Smriti Chandrika seems to hold the same view. Commenting on a text of Katyayana, he says: "The meaning is Manu and others consider that food and raiment are to be supplied to him who is excluded from inheritance by those who take his *father's* wealth . . . . . That where kinsmen have not taken the estate of *the father* of one who is excluded from

inheritance they are not to be compelled by the king to pay him maintenance." Smriti Chandrika, ch. V, S. 24. All the daughters of the insane man would be entitled to maintenance whether they were born at the time of partition or succession, or after.

It is also laid down that if a son is born to a disqualified person, he is capable of inheriting, or is entitled to a share. "If the eunuch and the rest should *at any time* desire to marry . . . . that son and the issue of such as have children shall be capable of inheriting." Manu, ch. IX, V. 203.

"But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments if free from similar defects." Yaj., ch. II, V. 141. In the Dayabagha, ch. V, V. 19: "But the sons of such persons being either their natural offspring or issue raised up by the wife as the case may be are entitled . . . to take their allotments according to the *pretensions of their fathers,"* and in a previous verse 11 it is said that such sons obtain their father's *share* of the inheritance.

The author of the Mitakshara lays down the rule in almost similar terms, and he says that this rule was laid down, as the disinherision of the disqualified persons seemed to imply disinherision of their sons. Mit. ch. II, sec. 10, V. 9.

It may also be stated that the son of *an outcast* is not entitled to inherit and is an exception to the rules laid down above.

The above are the texts from the leading authorities of both the Bengal and Mitakshara Schools and the following questions arise with respect to the rights of the sons of disqualified persons:—

(*a*) Whether they would inherit the property of a collateral, which their father would have inherited except for the disqualification.

(*N.B.*)—In principle there could be no difference on this point between the Mitakshara and the Bengal schools.]

(*b*) Whether under the Dayabagha they would be entitled to their father's share in the grandfather's property, if they were born at the time of the grandfather's death.

(c) Whether they would be entitled to their father's share in the grandfather's property, if they were born subsequent to his death.

(d) Whether under the Mitakshara they would be entitled to their father's share, if they were born at the time of partition.

(e) Whether they would be entitled to their father's share, if they were born subsequent to partition.

We proceed to answer the above questions in their order :—

(a) It will be observed that the texts do not lay down that the sons of the disqualified persons *represent* their father for all purposes. They merely declare that the sons are capable of inheriting; in fact their father is capable of transmitting *heritable blood* as distinguished from the father of an outcast. Again under Hindu Law the right of representation holds good only to a limited extent, and a son cannot represent his father for purposes of succession to the estate of a collateral. If on the death of a collateral the insane man happens to be the nearest heir, he will be considered as dead, and the estate will pass to the next in the line of heirs after him. If that next heir happens to be his own son, the son will succeed. But if that next heir be another person, that other will succeed to the exclusion of the insane person and his sons. While discussing the rights of maintenance of the insane man and his issue we had occasion to observe that the disqualified person had no sort of interest in the estate of a collateral taken by the next heir to his exclusion. The right principle in this class of cases is to consider the disqualified person as dead and the right of his sons to succession is to be treated in exactly the same manner as if the insane man were dead. *A fortiori* the son of a disqualified person who is born after succession opened is incapable of representing his father and obtaining the property which his father but for his disqualification would have inherited.

(b) This class of cases presents no difficulty as it is directly covered by the authority of the texts. Under the Dayabagha, property in the sons arises by the *death* of the father, and the sons, grandsons, and greatgrandsons, succeed to the property of the propositus. In succeeding to the estate of a lineal ancestor, the

sons, &c., represent the father, &c., so that if one of the sons of the propositus is dead leaving a son, the latter would be entitled to his father's share of his grandfather's property. Likewise if one of the sons is insane and is therefore not entitled to take a share, his son who is not similarly disqualified would be entitled to take the share of his father as if he were dead.

(c) In this group there may be two classes of cases: first, where a son is born to the disqualified son subsequent to the death of the grandfather, but before *partition* of the property by the sons; second, where the son is born subsequent to the death of the grandfather and subsequent to partition among the brothers. Under the Dayabagha law there is really no difference between the two classes of cases so far as the rights of the son of a disqualified person are concerned. It will be remembered that under the Dayabagha the sons do not acquire a right by birth to the estate of the father. In all cases where the sons obtain the property of a father, they obtain it as his heirs and the property vests in them as tenants in common and not as joint tenants with rights of survivorship. Their shares are not liable to be diminished or increased as in a Mitakshara family by the addition to or diminution of the members of the joint family; no one who is not alive at the time of the father's death takes a share in his property except an after-born son. Partition among them does not create any new rights, nor divest any vested rights, and the son of a disqualified son if he is entitled to obtain a share in the grandfather's property even though born subsequent to his death, would not lose it, because the sons have made a partition of the property, and likewise, if he would not be entitled to a share after partition, he would equally be disentitled to get a share before partition. Therefore, the only question to be considered in this connection is whether the son of a disqualified son born after the death of the grandfather is entitled to get the share of his father divesting it from any intermediate owner. This question was decided in the negative by a Full Bench of the Calcutta High Court in a case reported in *Kalidas Das* v. *Krishna Chandra*, 2 B. L. R. (F.B.), p. 115. There the original owner of the property died leaving a blind son, some widows and a nephew, the son of his brother. After the death of the last surviving widow, the estate descended to the nephew. Subsequent to this a son was born to the blind man, and the son sued to recover the property

from the nephew. *Norman*, J., who originally tried the case, held that the grandson was entitled to recover. From this decision there was an appeal, and it was held following an earlier decision in *Pareshmani Dasi* v. *Dinanath Das*, 1 B. L. R. (A. C. J.), p. 117, that the property having vested in a full owner could not be divested by the subsequent birth of a son. The decision on appeal was based on the definition of heritage by Jimutavahana and also on the ground "that there was no case in which an estate vested in a male heir by inheritance can be divested by the adoption of a son by a widow after her husband's death." Heritage is defined by Jimutavahana to be wealth in which property dependant on relation to the former owner, arises on the demise of the owner. Day, ch. I, v. 5. Under the Bengal School of Law property for the first time vests in the sons on the death of the father, and if one of the sons is dead or insane, his share will pass to the son of the deceased or disqualified son (if he has any) on the principle of representation allowed in *lineal descent* under Hindu Law. But if the deceased or disqualified son has no son living at the time when property vests, *viz.*, on the death of the father, then the whole property vests in the other sons. The only case in which the property which is so vested in the other sons would be divested is the birth of an after-born son which could happen only when the mother is *enciente* at the time of the father's death. In this case, however, the after-born son's right dates from the time of his conception. Their Lordships, the Judges of the Calcutta High Court, therefore say that as no property vests in the disqualified son at the time of his father's death, and as he has no son then living to represent him and take his share, his after-born son does not get any share or obtain any interest in his grandfather's property. Their Lordships also discuss the texts of the Mitakshara on this point and refer to the analogy of the after-born son therein referred to. They give a narrow interpretation to the text of the Dayabagha which says that the son of a disqualified person gets his father's share, and say that it merely declares that the sons have heritable blood; and restrict the text to those cases where the son of a disqualified son is living at the grandfather's death.

On the other hand it must be remembered that the laws relating to exclusion belong to an archaic state of society, that these penal provisions ought to be strictly construed; while the rules

which allow the resumption of or create new rights ought to be liberally construed. Under the ruling of their Lordships in the above case the disqualified person and his *daughters* would be entitled to maintenance while his *son* would not be entitled to it, as no provision is made for the maintenance of the sons. If there is any peculiarity in Hindu Law, it is its great anxiety to provide for the maintenance of all the members of the family out of joint funds, and it would be very surprising, if the son is held not entitled to any maintenance while the daughters are entitled to the same. This suggests the inference that the son whenever born would be entitled to take the father's share divesting it from the hands of any intermediate owner. *Mr. Justice Norman* refers to the verse of Manu, which says that 'if the eunuch and the others should *at any time* desire to marry and have sons, these sons would be entitled to their father's share." The words *at any time* strongly point to the conclusion that even an after-born son would get his father's share. Again it is not correct to say, as the learned Judges of the Calcutta High Court have said, that there is no case in which an estate vested in a male can be divested by adoption by a widow after her husband's death. For instance in every joint Hindu family under the Mitakshara Law if a member dies leaving his widow a power of adoption, by her adoption she necessarily divests the other members of the family of her husband's share; and this happens whether the other members have divided or have remained joint. We may also refer in this connection to the case of *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., p. 164. In this case A and B were brothers and members of a joint Hindu family owning an impartible zemindary descendible by the rule of primogeniture. A was the last Zemindar. He died giving his widow a power to adopt. On the death of A without issue, B succeeded to the zemindari by survivorship. A year after the death of A his widow adopted a son and the adopted son was held entitled to the property, thus divesting the estate vested in his uncle B. This case had not been decided at the time of the decision of the Full Bench case in 2 B. L. R. This is a case from Madras, and it will be seen that a case of this sort could not arise in Bengal. But that, it is submitted, does not make any difference in principle, for at the time when the property vested in B, there was no member of the joint family who had any right therein or had any vested interest in it. If again, for example, the

property instead of being indivisible had been ordinary divisible property and B. had succeeded to the whole, the joint family would be at an end; but all the same, on the adoption of a son by A's widow that son would be entitled to his father's share. In these cases the estate taken by an intermediate owner is in the nature of an estate in fee simple subject to a condition subsequent, on the happening of which the estate shifts to another person. If the happening of the condition becomes impossible, the estate becomes absolute. We submit that the estate taken by a person in supersession of a disqualified sharer is of a like nature, and on the happening of the condition subsequent which is the birth of a qualified son to the disqualified person, the estate shifts to that son. No doubt there is a limit now placed by the decisions to the time within which a power of adoption could be exercised so as to divest an estate, after which it is held to be void. It will be seen that from the nature of the case a limit is placed also in the case of divesting by the son of the disqualified person, *viz.*, the lifetime of the disqualified person; for it is laid down that his adopted son could not take his share.

The case of *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R., 3 I. A., 164, was referred to in two Calcutta cases. (See *Kally Prosonno* v. *Gocool Chunder*, I. L. R., 2 C., 295, and *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R., 7 C., 178). In both these cases it was held that succession cannot be held in abeyance till a preferable heir comes into existence, but the person who is the heir at the time when succession opened will be the absolute owner and the subsequent coming into existence of a preferable heir by means of an adoption would not entitle the adopted son to recover the estate. In the former of the two cases the Privy Council case was distinguished on grounds which are clearly incorrect. In the latter the case was distinguished on the ground that it was a case of 'lineal succession,' see at p. 189. Both the Calcutta cases were cases of collateral succession. The latter case went up to the Privy Council and the Judicial Committee while affirming the judgment of the High Court say, "According to the law as laid down in the decided cases an adoption after the death of a *collateral* does not entitle the adopted son to come in as heir of the collateral." See *Bhubaneswari Debi* v. *Nilcomul Lahiri*, I. L. R., 12 C., 18. Applying the same analogies in cases of collateral

succession, the subsequent birth of a son to the disqualified person would not entitle the said son to stand in the shoes of the father and obtain the property which his father would have succeeded to but for his disqualification. But in cases of *lineal succession* the after-born son of a disqualified son would obtain the share of his father in his grandfather's property. This also agrees with the limited right of representation recognized in Hindu Law.

It must, however, be pointed out here that under the Bengal Law such an estate in fee simple with a condition subsequent, on the happening of which the estate shifts, is unknown. There could be no case of adoption where the adopted son would divest the estate in the possession of the male holder. For instance, in a case similar to that reported in 3 I. A., p. 164 the widow of A would succeed to the estate and not the brother. It may therefore be said that Jimutavahana is not likely to have created this new kind of estate. But it must also be remembered that the Dayabagha is only an innovation of, or a development from, the Mitakshara; that the theory of property propounded by Jimutavahana is not carried out to its logical results in all directions. As a matter of fact Jimutavahana makes use of his theory of property for the purpose of giving the father of the family a right to alienate the ancestral property (even this is doubtful), and for the purpose of preventing the sons from claiming partition during the lifetime of the father, and to prevent survivorship among the members of the family. Just as in a Mitakshara family, under the Bengal School of Law the father is bound to provide for the maintenance of the daughters and sons and for the marriage expenses of the daughters. Alienations by the father of the whole of the family property without reserving a portion for the maintenance of the members have been held to be invalid. And, lastly, if the father chooses to divide the family property among his sons, he cannot give the sons unequal shares; while if he were dividing his self-acquired property he could do so. There are, therefore, clear indications that, though Jimutavahana treated the family property in the hands of the father as the father's absolute property for certain purposes, it was still family property for other purposes, and the incidents of a joint Hindu family under the older school were recognized. The rules relating to exclusion were propounded at a time when probably individual property was unknown and the

joint family was the only proprieter. The author of the Dayabagha simply adopts the rules of the older writers and the rights of sons born to disqualified sons after the death of the grandfather seem to be the same as those assigned in the Mitakshara.

One more point only need be noticed in this connection. We find in the Dayabhaga no provision made for the re-vesting of his share in a disqualified person after the disqualification ceases, by means of medicaments, penance or otherwise; while the Mitakshara contains a definite rule on this point. If the omission by Jimutavahna meant that even after the disqualification ceases, he is unable to resume his share, the conclusion would be irresistible that his subsequent-born qualified son would not divest the estate vested in an intermediate owner. But we think that such was not the intention of the author, but that on the removal of the disability, the right to a share revives as in the case of an after-born son as stated in the Mitakshara. This, however, will be discussed later on.

We are, therefore, of opinion that *Mr. Justice Norman's* interpretation of the Dayabagha texts is correct and is certainly more equitable than the interpretation of the Judges in appeal.

(*d*) There could be no doubt that in a Mitakshara joint family if at the time of partition, a son is born to the disqualified son, he would be entitled to the share of his father. For no member of a joint family has, as such, any vested right in any particular share of the family property. He has only a right to enforce a partition, and the shares will depend on the state of the family at the time of partition. If at that time the disqualified member is unable to take his share, his son then living, would obtain his share under the express texts just as a son adopted by the widow of a deceased member of a joint family would get. In fact partition among members of a joint family corresponds for this purpose to the death of the father of the family under the Bengal Law.

(*e*) This class of cases has a close analogy to the class considered under division (*c*), *viz.*, the right of a qualified son of a disqualified father to a share in the grandfather's property under the Dayabagha Law. For after partition among members of the joint family the coparcenary ceases and the shares of the branches of the family could not increase or diminish by births or deaths in

the other branches. But there are exceptions to this rule. For example if A, B and C are brothers and members of an undivided family and if A dies leaving a widow giving her a power of adoption which she does not exercise till after a partition between B and C, the adopted son when he comes into existence will be entitled to claim A's share from B and C. Again if A has gone abroad and if under the impression he is dead B and C divide the property between themselves, on the return of A he would be entitled to his share. No doubt this is not a properly analogous case, but it illustrates the position that property once vested may under certain circumstances be divested. The analogy of an after-born son is also suggested in the Mitakshara. Again it is not correct to say that on a partition the joint family comes to an end for all purposes; for, the female members of the family are entitled to maintenance and for their marriage expenses from the family funds; and also such of the male members as are unable to take a share owing to their disabilities. In discussing the position of the son of a disqualified member under the Dayabagha we have given our reasons for thinking that even under that school the son would be entitled to his father's share. *A fortiori* under the Mitakshara he would be so entitled. Under the Mitakshara, divesting an estate from a male owner obtains in the case of adoption (L. R. 3 I. A., p. 164) while such a thing could not happen in any case under Dayabhaga Law. Further the Mitakshara provides on the cessation of the disability the disqualified member gets his share, apparently divesting it from the intermediate possessor. Accordingly in the case of *Krishna* v. *Sami*, I. L. R., 9 M., p. 64, the Full Bench of the Madras High Court held that the son of a deaf and dumb member is entitled to obtain his father's share from his cousin. The position of the family was as follows:

Sami.	Venkatasami.
Deaf and dumb son.	Krishna, 1st defendant.
Sami and Gopala, Plaintiffs.	Sons, 2nd and 3rd Defendant.

On the death of Sami the whole family property vested in the first defendant Krishna and his sons by survivorship. After this period, plaintiffs were born. At the time of such vesting there was

strictly no coparcenary of which they or their father were members, yet it was held that the family was to be treated as undivided coparcenary and that the plaintiffs were entitled to their half share. The analogy of an adopted and of an after-born son was strongly relied on in support of the ruling. An exactly similar case arose in Bombay, *Bapuji Lakshman* v. *Pandurang*, I. L. R., 6 B., 616, where on the authority of the Calcutta case, *Kalidas Das* v. *Krishan Chandra*, 2 B. L. R., F. B., 103, a decision adverse to the claim of the son of the disqualified member was given; but for reasons already given we prefer the decision of the Madras High Court.

The effect of the insane person being cured of his insanity and the effect of dispositions made by the intervening heir during the disability of the nearest heir will be considered later.

K. SRINIVASA AIYANGAR.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER I.

Partition of Heritage.

1. In this connection, Manu says: "Thus has been declared to you the law for the conduct of man and wife abounding in affection. Learn now the law of partition of heritage."(1) Narada says: "Where division is made by the sons of their father's wealth, that topic of litigation is called by the wise partition of heritage."(2) *Commentary*—'Where' means 'in which topic of litigation.' '*Prakalpyate*' means 'made.'

2. Manu says: "After the father and the mother, let the brothers being assembled divide their father's wealth equally; for while their parents live, they have no power over it."(3) *Commentary*—The word '*samam*' means 'equally'; the meaning is that in such a case the doctrine of reserving a twentieth share, etc., does not apply. If it be contended that Manu lays down this doctrine of reserving a twentieth share in connection with partition between brothers after their father's decease and that therefore the division cannot be equal, it is replied that that text applies to cases of eldest

(1) Manu, chap. IX, 103. (2) Narada, chap. XII, 1,
(3) Manu, chap. IX, 104.

sons possessed of good qualities, etc. But Udayakara in his commentary upon this text observes that the word 'equally' is intended to refer to the wealth left after the deduction of the twentieth share, etc., is made. Halāyudha and Pārijāta read '*Saha*' (together) in the place of *Samam* (equally) and Pārijāta in his commentary says that '*Saha*' means 'mutually.' The word '*Pitrika*' is an *Ekasesha* compound formed by adding the *Taddhita* suffix. Halayudha says that the word '*Pitrika*' includes the mother's wealth also. Some say that even if the word '*Pitrika*' were an *Upadana*, it must be understood as including the wealth of the paternal grandfather and others as the text which begins with "In the property of the paternal grandfather" speaks of partition of such property also. Both these must be held to be included in the term.

3. Devala says: "Let the sons divide the father's wealth after his decease; for they have no ownership while he is alive and free from defect."(1) *Commentary*—'Free from defect' means 'free from such defect as liability to excommunication, etc.'

4. Narada says: 'When the father has gone to heaven, let the sons divide the father's wealth. Let the daughters divide the wealth of their mother, and in default of daughters, their issue."(2) *Commentary*—Let the daughters divide their mother's wealth; in the absence of daughters, let their issue, *i.e.*, the issue of the daughters divide. This is the meaning. As the portion of the text 'When the father has gone to heaven' indicates partition only among sons, the use of the word '*putra*' (son) is for the purpose of the inclusion of the *kshetraja* and other sons also. It therefore follows that so long as a son of any of the twelve kinds is alive, none else shall take the wealth. The expression 'of the father' is used for the purpose of indicating that there should not be a division among brothers of the gains of learning, etc., acquired by one of them. The word '*thad*' in the original must reasonably be taken to stand for 'daughter' because of proximity. Lakshmidharesvara also is to the same effect; but Prakāsa and Pārijāta hold that the word in the original '*thadanvaya*' means 'the issue of the daughters *i.e.*, the son, the son's son, etc.'

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(1) Cole. Dig., Vol. II, 196, V. (2) Narada, chap. XIII, 2,

5. Sankha and Likhita say: "Let sons divide the wealth after their (father's death). Sons cannot divide the wealth while the father is alive, although they have subsequently acquired it.. They have no power to do so. They are not their own masters in respect of wealth and religious duties while their father is free from defect."(1) *Commentary*—The expression 'subsequently acquired' means 'acquired by the sons independently of their father, by their learning, ability, etc., and by common exertion.'

6. Manu says: "The eldest son alone shall take the whole patrimony and the rest shall live in dependence upon him as on their father. A man becomes a father by the mere fact of the birth of his eldest son. His obligation in respect to the manes is discharged. The eldest son therefore deserves to take the whole wealth. He on whom the father shifts his obligation and by whom the father attains immortality is alone the son begotten of virtue. The rest (of the sons) are known to be born of desire. The eldest should protect his younger brothers as the father would do his sons and the younger brothers should, according to law, behave towards their eldest brother as sons should behave (towards their father). The eldest son it is by whom the line prospers or is ruined. The eldest son is most respected in the world and the eldest son is not treated with contempt by good men. The eldest son whose character is most honourable should be regarded like the mother and the father; but even he whose character is not most honourable should be respected like a relative. The eldest should not withhold from the youngers their shares (in the father's wealth)."(2) *Commentary.*—The text 'the eldest alone shall take, etc.,' means that the eldest son possessed of all qualities of the eldest son is as independent as the father in respect of partible property. The expression 'shall live in dependence on him' means 'shall follow his pursuit.' The expression 'becomes a father' means 'has obeyed the injunctions of the sastras enjoining him to procreate issue.' The expression 'by the mere fact, etc.,' shows that *samskāras* are immaterial. 'His obligation is discharged' means 'that he is released from one of the three obligations indicated by the *Sruti* which says that every man is born with three obligations.' The word '*Sannayati*' means 'unites,' '*Anantyam*' means 'happi-

(1) Cole. Dig., Vol. II, 199, VII. (2) Manu chap. IX, 105—110,

ness without end.' '*Asnute*' means 'obtains being freed from obligation.' The text 'the rest are born of desire' is an exaggeration. (The eldest son) should treat (the rest) like a father, *i.e.*, should not cheat them. The younger brothers should behave like sons, *i.e.*, should bear no grudge towards him. The eldest son makes the family prosper by good actions and protecting his younger brothers. The text 'Or is ruined,' suggests such a possibility. The duty of the eldest son is to support and protect his younger brothers, etc. He must be treated like a relative, *i.e.*, must be respected by such acts as rising on his arrival, prostrating before him, etc., and honoured as the maternal uncle, etc., not treated with contempt. '*Yautaka*' means 'wealth partitioned and set apart.' The root '*yu*' means 'to mix.' Halayudha, however, interprets '*Yautaka*' as 'ornaments of the wife, etc.'

7. Narada says: "Let the eldest brother of his own free will support the rest like a father, or let a younger brother who is capable do so. The prosperity of the family depends upon ability (of management)."(1)

8. Sankha and Likhita say: "Willingly let them live together; United, they may thrive."(2) The meaning is that resting upon mutual support, they will certainly become prosperous.

9. Manu says: "Let (the brothers) live thus in union or separately in view to the performance of religious duties. By separation, religious duties increase. So is separate living lawful."(3) *Commentary*—As none can have an independent power of disposition over joint wealth, and as, therefore, there can be no performance of sacrifices, etc., which requires separate and exclusive property for their performance, partition whose consequence is the acquisition of absolute power over property is said to be legitimate. To live separately in view to perform religious duties is only optional. It does not mean that living together without partition is unlawful like eating flesh. By partition religious duties like *Jyotishthoma* sacrifice increase.

10. Brihaspati says: "Where brothers live in commensality the worship of the manes, deities and Brahmins is one (need be per-

(1) Narada, chap. XIII, 5. (2) Cole Dig., Vol. II, 804, XIX,
(3) Manu, chap. IX, 111.

formed by one for the benefit of all); but where they are divided, the same has to be performed in the house of every one of them."(1) 'In commensality' means 'without division.'

11. Harita says: "While the father lives, the sons have no independent power in regard to receipt, disbursement and amercement of wealth. But if he be prodigal, absent, abroad or afflicted with disease, let the eldest son look to the affairs (of the family)."(2) *Commentary*—'Receipt' means 'using the joint wealth independently of the father.' Pārijata says that the word means 'acquisition of wealth.' The word '*visarga*' means 'giving away.' '*Akshêpa*' means 'recovering money from the debtor.' The word '*Kāmadāne*' means 'giving away wealth according to whims.' Prakasakāra reads '*Kāmamdine*' for '*Kāmadāne*' and says that '*Kamam*' indicates the permission granted by the father near at hand and that the word '*dine*' means 'out of his mind.'

12. Sankha and Likhita say: "Should the father be incapable, let the eldest (son) manage the affairs of the family or with his consent, his younger brother who knows the business. There can be no partition while the father does not wish it. If he be old, deranged in mind or afflicted with chronic disease, the eldest (son) alone should manage the family estate and protect the rest; for it is well-known that (the prosperity of a) family depends upon wealth. Men whose father is alive have no independence; likewise while their mother is alive."(3) *Commentary*—'*Anantara*' means 'subsequently born. 'With his consent' means 'with the consent of the eldest son.' 'Deranged in mind' means 'out of his mind owing to disease proceeding from air, etc.' The management of the family depends on wealth. 'Have no independent power' means 'are incapable of making gifts', etc. The meaning is that so long as a virtuous mother is alive, the sons have no independent power.

Here ends the Chapter of Vivadaratnakara on Dayavibhaga.

(1) Brihaspati, chap. XXV, 6. (2) Cole. Dig., Vol. II, 199, VIII.
(3) Cole. Dig., Vol. II, 203, XVII.

CHAPTER II.

Next partition among sons whose father is alive.

13. On this point, Manu and Vishnu say : " Where the father recovers ancestral property given up as irrecoverable, he need not divide such property against his wish with his sons, being self-acquired."(1) *Commentary*—' Ancestral ' means ' descended from father, etc.' ' Irrecoverable ' means ' which the father was not able to recover.' He need not divide such property, if unwilling, with his son, because it is self-acquired.

14. Yajnavalkya says : " In land acquired by the grandfather, in corody or chattel, the ownership of both father and son shall be the same."(2) *Commentary*—*Nibandha* means that which is fixed, *i.e.*, wealth obtainable from mines. ' Ownership being the same ' means that there shall be no greater share allowed to the father and no gift (of the property) at the father's choice.

15. Vyasa says : " In house and land descended from ancestors the father and the son take equal shares. Sons are not entitled to partition in the father's property while the father is unwilling."(3)

16. Brihaspati says : " In property acquired by the paternal grandfather, moveable and immoveable alike, the right of the father and the son is well-known to be equal. In the paternal grandfather's property lost and subsequently recovered by the father with his own abilities and in property acquired by the father by his learning, valour, etc., the ownership according to the *Smritis* is with the father. He may, as he pleases, make a gift of that wealth or allow a partition of it. In the absence of these, his sons are declared to be entitled to share it equally."(4) *Commentary*—The word ' lost ' means ' taken away by others.' The meaning is that property so lost which the paternal grandfather was not able to recover and which was subsequently recovered by the father by his own exertions and property acquired by learning, valour, etc., the father may dispose of, etc. On the right of the sons to make a partition, Narada says : " (Let the sons divide) after the mother has ceased to menstruate

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(1) Manu, chap. IX, 209.
(2) Yajnavalkya, II, 121.
(3) Cole. Dig., Vol. II, 258, XCIV.
(4) Brihaspati, chap. XXV, 8, 12 & 13.

and after the sisters have been married or after cohabitation has ceased and when the father has lost all desire."(1) *Commentary*—The word '*Prattha*' means 'married.' 'After cohabitation has ceased' means 'after the physical power to cohabit is gone.' 'When the father has lost all desire' means 'when the father has given up worldly desires.' For 'after cohabitation has ceased,' Prakasa has two alternative readings, namely, 'after the wish to cohabit is gone' and 'after cohabitation has become impossible;' but these different readings as interpreted in the commentary do not in the result conflict with this reading. Halāyudha reads 'turned away from cohabitation'; but even according to that, the drift is the same.

17. Brihaspati says: "Partition among brothers after the death of their parents has been laid down. But partition may take place even while the parents are alive, when the mother has ceased to menstruate."(2)

18. Goutama says: "Let the sons divide the wealth after their father's death or when their mother has ceased to menstruate and their living father is willing."(3)

19. Sankha and Likhita say: "Or partition may take place while their father is alive, with his consent and openly or secretly according to law."(4) *Commentary*—'Consent' means 'the father's consent.' 'Openly' means 'in the presence of umpires.' 'Secretly' means 'without umpires.'

20. Baudhāyana says: "Partition (shall take place) with the father's consent."(5)

21. Next Hārita says: "A father may make a partition during his lifetime, go to the forest or enter into the order suitable for an aged man; or he may divide a small part of his property (among his sons) and remain (in his house) keeping the greater part of it. Should he lose his wealth, he may take the son's share back from them. He must also give a portion to his indigent sons."(6) *Commentary*—'Go to the forest' means 'enter into another order.' Pra-

(1) Narada, chap. XIII, 3.
(2) Brihaspati, chap. XXV, 1.
(3) Goutama, chap. XXVIII, 1–3.
(4) Cole. Dig., Vol. II, 205, XXI.
(5) Baudhayana, II, 2, 3 & 8.
(6) Cole. Dig., Vol. II, 205, XXIII.

kasakara says that 'entering into an order suitable for an aged man' means 'to renounce all *karma* and live upon the wealth of the son.' Halāyudha and Pārijāta, however, say that the order suitable for an aged man is the fourth order. According to them, 'going to the forest' means 'entering into the order of the *Vānaprastha*.' The particle '*vā*' really indicates disinclination. That word shows that there is a mode of life other than going to the forest or entering into the order suitable for an aged man. 'Divide a small portion, etc.,' must be understood to apply to persons who wish to remain in the householder's order even after becoming true sanyasins. The word '*Upadasyêt*' means 'grow poor.'

22. On this point, Narada says: "Or the father who has become old may of his own free will make a division between his sons, either giving to the eldest son the largest share or in any other mode, according to his wish."(1) *Commentary.*—The word '*va*' denotes an alternative. The meaning is that the father or the sons may divide. 'Become old' means 'rendered incapable more than previously.' Therefore alone Goutama in the text beginning with 'the son born after partition,' etc., says that partition should be made where a son is born after partition. The word '*jyeshta*' means 'most excellent.' 'According to his wish' means 'in equal or unequal shares as he pleases.'

23. Vishnu says: "If the father should make a partition among his sons, he has absolute power over wealth acquired by himself."(2) *Commentary*—This applies to property acquired without the aid of the father's wealth.

24. Yajnavalkya says: "If the father should make a partition, let him separate his sons at his pleasure. He may give the eldest son the best share or let all the sons share equally."(3) *Commentary*—This text also refers to self-acquired property of the father; for in property acquired by ancestors, the father and the son are said to be entitled to share equally.

25. In this connection, the same author lays down a special provision where the partition is equal. "If he make the shares equal, his wives to whom no separate property has been given by the

(1) Narada, chap. XIII, 4. (2) Vishnu, chap. XVII, 1.

(3) Yajnavalkya, II, 114.

husband or the father-in-law must be rendered partakers of like portions."(1) *Commentary*—If the father gives his sons equal shares, then his wives also should be made to get equal shares. Therefore, where the shares of the sons are unequal, it must be understood that the wives also take unequal shares. The wives are not the wives of the sons, the term 'wife' being correlated to the person making the partition, *i.e.*, the father. The meaning of the latter part is that where any of the wives have not been given any property by the husband or the father-in-law, she or they must be made equally rich with the rest. Halāyudha holds that this applies even in the case of wives having no issue. Prakāsa says that where any *stridhanam* has been given, she takes only a half (of what she would otherwise get).

26. Narada says : "Let the father making a partition reserve two shares for himself."(2) *Commentary*—'*Pratipadyeta*' means 'obtain.' '*Vibhajan*' means 'making a partition.'

27. Brihaspati says : "The father may take two shares for himself at a partition made during his lifetime."(3) *Commentary*—This text in the light of the text of Sankha applies where the father has an only son. Sankha and Likhita on the rights of the father say ; "If the father has an only son, he may take two shares for himself and a larger share of bipeds and quadrupeds."(4) *Commentary*—It means that the father may take a larger number of these and two shares also. Accordingly it is said : "The bullock should be given to the eldest, and the house, except where the father resides, to the youngest."(5) *Commentary*—The following is the drift : Where the father has many sons and the eldest and the youngest are possessed of good qualities, the bullock should be given to the eldest and the house to the youngest *even against the wishes of the father* : for otherwise the rule would serve no purpose. As regards the text of Yājnavalkya, which says :—" Or let all the sons take equal shares," Halāyudha observes that that does not conflict with the text under consideration, that text being intended to lay down simply that where all the sons are equally worthy, they may at the

(1) Yajnavalkya, II, 115. (2) Narada chap. XIII, 12.
(3) Brihaspati, chap. XXV, 5. (4) Cole. Dig., Vol. II, 216, X LIV.
(5) Cole. Dig., Vol. II, 216, X LIII.

father's option be given equal or unequal shares at the partition. Pārijāta says that an only son is the eldest son. Bhashyakara omits the word '*putra*' (son) and reads 'if the father be alone' which he explains as meaning that even if he has no wife living the father gets two shares, and if his wife is living he should gladden her by giving her another share. Of bipeds and quadrupeds let him take one more than his two shares. This rule of inequality applies where the eldest and the youngest are possessed of good qualities and it has effect even though the father be unwilling, for otherwise the rule will become inoperative. The equality of shares spoken of by Yājnavalkya applies where all the sons are possessed of good qualities. In the absence of any excellence, the sons share equally or unequally according to the father's choice. The word '*anyatra*' means 'excluding the house where the father resides.'

28. Baudhayana says : "Let him make a partition among his sons; the shares of all shall be equal, it being without distinction laid down in the *Srutis*. Let the eldest take one most excellent chattel, as the *Srutis* declare 'It is necessary to gratify the eldest son with wealth.' He shall take one out of every ten, and all shall share the rest equally."(1) *Commentary*—Of all the things available for partition the eldest son shall take one most excellent. The author supports this view by quoting the *Sruti* 'it is necessary, etc.' The word '*dhana*' is defined as 'deduction.' '*Niravasayanti*' means 'separate him from the other sons.' Another alternative is that the eldest may take one out of every ten cows, etc., of equal class even despite the father's wish. This alternative depends upon the degree of excellence which the eldest son possesses.

29. Apastamba says : "Having gratified the eldest son with one chattel, let the father in his lifetime distribute the wealth among his sons in equal shares, excluding the impotent, the mad and the degraded."(2) *Commentary*—This refers to the father who though alive has become incapable of procreating; one chattel, means one most excellent horse, etc. The impotent, etc., are intended to include all who are not entitled to inherit.

30. Here Manu says: "Where undivided brothers have combined their efforts, the father shall under no circumstances

(1) Baudhayana, II, 2, 3-3-1. (2) Apastamba, II, 6, 13-13 and II, 6, 14-1.

make an unequal partition among them."(1) *Commentary*—The 'effort' here meant is the endeavour conducive to the acquisition of wealth.

31. Narada, Brihaspati and Yajnavalkya say: "Sons to whom equal, less or greater shares have been allotted by the father shall respect such a distribution; otherwise they shall be chastised."(2)

32. Narada says: "For such as have been separated by their father with equal, greater or less allotments of wealth, such distribution shall be the legal one; for the father is the lord of all."(3) *Commentary*—There is no conflict between the previous text and this, as that forbids unequal partition among brothers of property acquired by them by their joint exertions and this allows of unequal partition of the ancestral property.

Here ends the chapter of Vivadaratnakara on Partition among sons during the father's lifetime.

CHAPTER III.

Partition among sons whose father is dead.

33. On this subject Manu says: "The portion deducted for the eldest is the twentieth part of the whole wealth, together with the best of all chattels; for the middlemost, half of that; and for the youngest, a quarter of that. The eldest and the youngest shall take as indicated and others than the eldest and the youngest shall take the best of all items of wealth and shall take any one thing superior in kind and the best of every ten."(4) *Commentary*—This deduction obtains in the case of the eldest possessed of good qualities, etc. The following is the settled rule on this point:—Where there are many sons of the same mother all possessed of good qualities, but less and less good according to their order, then a twentieth share of the common wealth should be deducted in favour of the eldest and he should also be given the best of all the chattels. Half of that, *i.e.*, a fortieth share (should be deducted) in favour of the middlemost, who should also be given a middling chattel. Similarly, a fourth, *i.e.*, one-eightieth of the

(1) Manu, chap. IX, 205.
(2) Brihaspati, chap. XXV, 4.
(3) Narada, chap. XIII, 45.
(4) Manu, chap. IX, 112-114.

whole wealth should be deducted in favour of the youngest, and he should be given also the least precious of the chattels. Where, however, the eldest and the youngest alone are possessed of good qualities, they should be allowed a deduction as laid down and the brothers intermediate who are not possessed of good qualities should get (only) the middling chattel and the deduction allowed in the case of the middlemost, *i.e.*, a fortieth share, should be equally divided and distributed. Where there are many between the eldest and the youngest eminently possessed of good qualities, the deduction of a fortieth share should be allowed and given to every one of them. If the eldest is eminently possessed of good qualities and the rest have none at all, then the most excellent of all the chattels, that which is superior in kind to the rest, such as *padmaraga* (a ruby) and the best one out of every ten of all cows, buffaloes, etc., shall be taken by the eldest.

34. Gautama thus lays down a distinction to be observed where the eldest is surpassingly good and the rest of middling quality. "To the eldest, a twentieth share, a pair, a cart drawn by animals having teeth in both jaws and an excellent bull; cattle, old, hornless, one-eyed and tailless, to the middlemost; if there be many of them, sheep, grain, iron, a house, a cart with bullocks and one of every class of quadrupeds to the youngest; all the rest should be divided equally"(1) *Commentary*—A twentieth share means a twentieth of the whole paternal wealth. 'A pair' means 'a pair of cows.' 'Animals having teeth in both jaws' are horses, asses, etc., a cart drawn by two animals of the same class from among these animals and an excellent bullock, *i.e.*, one capable of impregnating, these are the deductions, where available, in favour of the eldest. '*Khora*' means 'wool.' '*Kuta*' means 'having no horns.' '*Vanda*' means 'having no tail.' This is the ox well-known as '*Vende.*' This is the deduction in favour of the middlemost. The same rule applies where there are many of them. '*Avih*' means 'a sheep.' '*Dhanya*' means 'grain.' '*Ayas*' means 'iron.' As these are mentioned together, something of each must be given accordingly. '*Anaha*' means 'cart,' '*Yuktam*' means 'to which bullocks are yoked.' One of every class of quadrupeds, such as cows, etc. This is the deduction in favour of the youngest. Similarly

(1) Gautama, chap. XXVIII, 85.

where in the matter of deduction, a greater and a less are declared, the determination depends on the extent to which the brothers are possessed of good qualities. In the world, however, the eldest alone is respected and without allowing the deduction in favour of the middlemost and the youngest brothers, a twentieth share is deducted in favour of the eldest alone as we see.

35. Hārita says: "Where a herd of cattle is partitioned, one excellent bullock should be given to the eldest as also the idol in the house. If the rest leave and make (houses) for themselves, the best should be given to the eldest and the rest shall take according to their order."(1) *Commentary*—'*Ekadhana*' means 'one most excellent chattel.' '*Devata*' means 'image of Vishnu, etc., The house is the ancestral house. '*Kuryuh*' means 'build other houses, 'other houses' being understood. Where the other sons have to leave the ancestral house and build other houses, then the best house should go to the eldest. '*Ānupūrvyam*' means 'order of age.' Therefore, the middlemost gets a middling house and the youngest one smaller than that. Harihara, however, interprets '*Devatāgriha*' to mean 'the dome set apart for the worship of *Durga* and other deities' and says that that should be given to the eldest while other sons should build one for themselves.

36. Apastamba says: "In some countries, gold, black cows, black produce of the land and the vessels of the father are all given to the eldest."(2) *Commentary*—'Black produce of the earth,' *i.e.*, gingely seeds, black gram, etc. '*Paribhanda*' means 'vessels used for purposes of eating, etc.'

37. Baudhayana says: "In the absence of the father and in the four castes, cows, horses, goats and sheep, in the order of their mention are the share of the eldest."(3) *Commentary*—This rule applies where the eldest brother excels others in good qualities.

38. Devala says: "The middling share should be given to sons who are equal. To the eldest who keeps in the path of virtue, a tenth share should be given."(4) *Commentary*—'The middling share' means 'the middling deduction, *i.e.*, one-twentieth share.' Halāyudha and Pārijāta say that this rule applies where the eldest

(1) Cole. Dig., Vol. II, 218, X LVI.
(2) Apasamba, II, 6, 14-7.
(3) Baudhayana, II, 2, 3-9.
(4) Cole. Dig., Vol. II, 215, X. I.

is learned in the Vedas and where the others are not possessed of good qualities. Others hold that, according to the first half of the text where the eldest performs *agnihotra* and is learned in the Vedas and the other brothers are possessed of good qualities, the eldest should be given a tenth share and the other sons should each get the middling share, *i.e.*, a twentieth share. Where the eldest performs *agnihotra* and is learned in the Vedas and the other brothers are not possessed of good qualities, then the eldest should get a tenth share, and every one of the brothers having no good qualities should, as previously stated, get a separate allotment of a fortieth share. This is the meaning of the second hemistich.

Here ends the chapter of Vivadaratnakara on Partition among sons after the father's death.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Mathura Das *v.* Bhikhan Mal, I. L. R., 19 A., 16. There is no rule of Hindu Law that a gift to a female should only carry with it the limited nature of a widow's estate by inheritance. (*Kollany* v. *Luchmee*, 24 W. R., 395; *Pubitra* v. *Damoodur*, 24 W. R., 397.) But as pointed out by the Privy Council in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*, 2 I. A., 7, a gift or testamentary disposition by a Hindu in favour of a woman should be taken with the surrounding circumstances and the words of disposition should be so construed as to give effect to the intention which a Hindu is ordinarily supposed to entertain with reference to the estate conferred on a woman. Gifts, therefore, by Hindus in favour of their wives without special words creating an absolute estate have generally been construed to confer only a limited estate. The disposition in the present case, however, was in favour of the son's widow; and the disposition in favour of the adopted son and the son's widow together would rather seem to us to indicate that there was no difference intended between the nature of the estate conferred upon the son and that of the estate conferred upon the son's widow. Moreover, we do not think the learned Judges were justified in referring to the subsequent conduct of the son's widow in not contesting a certain decision as evidence of the nature of the estate intended to be conferred upon her by the terms of the will. We are aware of cases in which the Privy Council have construed the disposition in favour of a woman and a man

as giving her as large an estate as the male took. See *Narpat Singh* v. *Mahomed Ali*, I. L. R., 11 C., 1, and *Jogeswar Narain Deo* v. *Ram Chandra Dutt, Ib.* 23 C., 670. We are not, however, prepared to say that the decision is erroneous in regard to the first two villages. The words of disposition were simply that the son's widow shall be regarded as owner after the testator's death. These words would hardly seem to us sufficient to create a larger estate than that of a Hindu widow.

Tapesri Lal *v.* **Deoki Nandan Rai,** I. L. R., 19 A., 22. We are at one with the learned Judges who decided in this case that the absence of a certificate by the officer holding the sale under S. 293, does not vitiate the proceedings of the Court ordering the realization of the deficiency from the defaulter. We cannot regard such a certificate as a condition precedent to the proceedings contemplated by the second part of the section. But we doubt whether a separate suit will lie at the instance of the defaulter for the recovery of the money realized from him under S. 293. Section 30 of the Code has, of course, nothing to do with the question. This is the case of a miscellaneous proceeding followed by a suit; and S. 30 has no application to it. But we apprehend that it is a judicial order and not a purely ministerial one which directs the payment of the defficiency, and the recovery of money under judicial process cannot furnish a cause of action for a suit by the defaulter.

Lachman Das *v.* **Khunnu Lal,** I. L. R., 19 A., 26. The point involved in this is one of very considerable importance. When ancestral property has descended from the grandfather to the grandson, can a debt secured upon the property by the grandfather be recovered with interest from the assets in the hands of the grandson. The Judges of the Allahabad High Court, in Full Bench, answer the question in the affirmative. The principal money secured and the interest were, no doubt, recoverable from the assets in the hands of the son. There was thus a valid charge upon the property to the extent of the whole claim so long as the property was in the hands of the grandfather and after him in those of his son. A difficulty arises as to how the debt shall be extinguished as regards the interest the moment the property passes to the grandson. It might always be contended that so far as the grandson's share of the property is concerned, the grandfather has no business to charge it with interest upon the debt. But as regards the shares of the other people, namely, those of the grandfather and the father, they come to the grandson burdened with the charge. It may be held that the right of the grandfather to burden the grandson also for a debt not illegal or immoral extends only to the burdening of his share with the principal of a debt borrowed. We are unable to see that the decisions of the Privy Council

as regards the son's liability to pay the father's debts involved any principle rendering the assets in the hands of the grandson liable also for the interest of the grandfather's debt; nor does the Transfer of Property Act appear to us to affect the question. We are, therefore, inclined to think that if there is any authority in the Sanskrit texts limiting the liability of the grandson only to the principal of the grandfather's debt, effect could well be given to it by freeing his share of the ancestral estate at the time of the creation of the debt from liability to interest. There seems, however, to be considerable force in the argument of *Knox*, J., that the rule as to freedom from liability to interest has no application to secured debts. If this be the case, the inconveniences in the drawing up of a mortgage decree referred to by the majority of the judges have no place. The texts cited appear to us to warrant the rule that in the case of unsecured debts incurred by the grandfather, the grandson is not liable for the interest; for he takes the property, or rather the share of the grandfather by survivorship, and the rights so taken are only subject to the limitation created by the Hindu Law.

Mathura Das *v.* Raja Narindar Bahadur, I.L.R., 11 A., 39. This decision may well be regarded as setting at rest a controversy started by the Allahabad High Court about ten years ago as to *post diem* interest. The conflict of authority in the decisions of the Madras High Court and also in the decisions of the Calcutta High Court may well be deemed to have been set at rest. We must, however, confess that few decisions of the Privy Council have used language more unsatisfactory than the judgment in the present case. We are extremely unwilling to use any language calculated to impair the respect due to the august tribunal which is the final court of appeal for India and all the British Colonies. We are not told whether their Lordships depart from the principles laid down in *Cook* v. *Fowler*, L. R., 7. English and Irish Appeals 27. The reference they make to the covenant not to transfer till principal and interest be paid and to the provision for applying payments to the reduction of interest seems to suggest that the intention of the parties that interest will be continued to be paid *post diem* as gathered from the language of the instrument under consideration is confined to the particular language used and will not ordinarily be presumed to extend to other mortgage instruments where there is a covenant to pay the principal and interest by a certain date merely. However this may be, taking the contract as making no provision for *post diem* interest and assuming that damages are recoverable by way of interest, their Lordships ask with the appellants before them why

they should not recover six years' interest by way of damages. They observe that every day the principal debt remained unpaid, there was a breach of contract and that the bar of time applied only to breaches occurring six years before suit. If we are to understand this language in its ordinary signification, it comes to this that there is a continuing breach of contract every day the debt remains unpaid after the due date and S. 23 of the Limitation Act giving a fresh starting point from each subsequent breach would save the suit from being barred at any time. It seems somewhat extraordinary to be told that there is a breach of contract every day the principal remains unpaid.

Shah Abu Ilyas *v.* Ulfat Bibi, I. L. R., 19 A., 50. The difficulty felt by *Knox, J.*, in this case as regards the absence of any provision in S. 490 for making any enquiry as to the continuance of the status of husband and wife seems to be real; but it cannot be supposed that while the Magistrate is entitled to cancel the order on proof that husband and wife are living separately by mutual consent or that the wife is living in adultery, the Magistrate is precluded from stopping the allowance while the marriage tie itself has been severed. The strong consensus of authorities notwithstanding the absence of any clause in S. 490 or in S. 488, authorizing the discontinuance of the allowance, is sufficient proof of what should have been in the mind of the Legislature regarding the continuance of the marriage relation as a condition precedent to the continuance of the allowance.

A. B. Miller, Official Assignee of the Estate of Ramakishen Das *v.* Babu Madho Das, I. L. R., 19 A., 76. We are glad that the Privy Council has declared that an erroneous omission to object to the admission of testimony on the ground of irrelevancy does not make it available as a ground of judgment. Several judges of the Madras High Court have been acting on the view that a legal objection arising on proved or admitted facts not taken in the court of first instance cannot be raised for the first time in appeal. We have always been clear that such a rule was erroneous. Indeed the Courts in England and India had several times said so. The disinclination to consider knotty points which is a weakness of some judges is alone to account for the practice we have referred to. We hope that the reiteration by the Privy Council of the sound principle will be loyally followed. The decision does not of course mean that if secondary evidence was received without objection, it could be objected to in appeal on the ground that primary evidence should have been adduced.

Sadho Saran v. Hawal Pande, I. L. R., 19 A., 98. We have no doubt that the view of the Full Bench that S. 43 does not apply to execution proceedings is right. Indeed S. 647 A. would make it perfectly clear even if there was any doubt about it prior to its enactment. The decree for possession and for mesne profits is for two distinct reliefs either of which may be enforced without reference to the other. If there was any doubt upon the question, some prior decisions of the Allahabad High Court with reference to S. 373 would be answerable for it.

Muhammad Sirajul-Haq v. Imam Ud-din, I. L. R., 19 A., 104. A suit by certain persons to dismiss the defendants from trusteeship and appoint certain others instead and place them in possession, is not a suit for possession of property to be valued as such for purposes of court fee. Art. 17, cl. 6 of the second schedule of the Court Fees Act applies to the case. The decision in *Thakuri* v. *Bramha Narain*, I. L. R., 19 A., 60, is also to the same effect as the case under notice. But that the prayer of the plaintiffs to appoint certain persons other than the plaintiffs or such persons as the Court thinks fit does not affect the question. There is no doubt that the decision of the Madras High Court in *Srinivasa Ayyangar* v. *Srinivasaswami*, I. L. R., 16 M., 31, lays down that the plaintiff should pray for possession and not merely to remove the defendants' trustees. This too appears to us to be questionable. The suit for possession which is to be stamped *ad volorem* does not include one in which the plaintiff prays for possession being given to the trustees whom the Court may appoint.

Mutasaddi v. Mani Ram, I. L. R., 19 A., 112. Where part of a fine imposed is paid as compensation to the complainant in accordance with an order under S. 545, but the sentence is quashed in appeal or revision, there is no provision in the Code authorizing the realization of the money from the complainant. S. 547 does not appear to us to have any application. The Madras High Court appears to have been of this view in a case reported by Weir in p. 1143.

Vasudevan v. Sankaran, I. L. R., 20 M., 129. There has always been a mystery shrouding questions of Malabar Law which makes Judges fight shy of them. It has appeared to us somewhat difficult of explanation that an accepted principle of law when applied to a Malabar case assumes a form to the minds of Judges which renders it unrecognizable. The present case is an instance of an error which has been perpetuated for many years, only because it was supposed to be involved in the intricacies of Malabar Law. There was no explanation as to why the decree in a suit *by* a *karnavan* which went against him was binding

upon the *anandravans* in a subsequent suit by them upon the same cause of action, while a decree in a suit *against* the *karnavan* had not the same force. The Judges in Full Bench have rightly overruled the course of decisions holding that, notwithstanding the decree against the *karnavan*, the *anandravans* might sue to get rid of it.

Sankaran *v.* **Raman Kutti**, I. L. R, 20 M., 152. One of the points decided in this case was that from the decision of a single Judge of the High Court in an appeal from an order of remand there is no appeal under S. 15 of the Letters Patent. This is, no doubt, in accordance with the view of the Full Bench of the Allahabad High Court. But we have expressed our disagreement with this in a critical note on *Muhammad Naimullah* v. *Ihsanullah Khan* 2, M. L. J. 343. The same question in another case was referred to the Full Bench in Madras; it was argued and judgment was reserved for a period of more than six months; then it was simply disposed of by the Judges saying that it was unnecessary to consider it. The question then arose in this way. An order for security for costs was made by a single Judge in a regular appeal. An appeal under the Letters Patent was preferred against his order. In this appeal under the Letters Patent, the respondent raised the preliminary objection that there was no appeal under the Letters Patent by virtue of S. 591 of the Civil Procedure Code. The question, whether there was an appeal under the Letters Patent from the order of a single Judge directing security for costs, was referred to the Full Bench and on argument, judgment was reserved. In the meantime, the security ordered not having been furnished within the time specified, the regular appeal was dismissed. The Judges in Full Bench dismissed the appeal under the Letters Patent as the regular appeal out of which it arose had already been dismissed. Perhaps, we should correct the statement and say that two of the Judges of the Full Bench—The *Chief Justice* and *Benson*, J.—passed the order of dismissal, the other Judges having been informed that it was unnecessary for them to deliver their judgments. What a commentary upon the ways of the High Court!

Shankar Diyal *v.* **A. M. Venables**, I. L. R., 19 A., 121. The wording of S. 195 of the Criminal Procedure Code does undoubtedly give rise to the difficulties pointed out by *Edge*, C. J. To whom an appeal ordinarily lies is not always a question of easy solution. It looks somewhat anomalous that the District Court should be deemed to be the *forum* to which appeals ordinarily lie from the Assistant Collectors, and yet we cannot say that the decision is wrong. An amendment of the section appears to be clearly needed.

Janki v. Bhairon, I. L. R., 19 A., 133. It appears to us that considerable difficulties have been caused in the interpretation of wills by attending too much to the surrounding circumstances without confining ourselves to the language of the will itself. The nature of the estate that testators intend to grant to their devisees should be made manifest by the language they choose to employ and not by reference to the character and position of the devisee. We are aware that the Privy Council is responsible for this state of things. We think it is yet possible to make a stand and for the court to proceed upon clear and definite lines. The decision in the present case introduces a further difficulty as to whether the estate granted is a widow's limited estate of the absolute property of the devisee or her sridhanam property with a special course of devolution and limited rights of alienation. Instead of introducing the last alternative which only further complicates matters when there is no express language to warrant the same there is enough in the language to show that the estate is absolute.

Bhagvati Prasad v. Jamna Prasad, I. L. R., 19 A., 136. The assignee of a decree having executed it, and the decree having been reversed in appeal without the assignee having been made a party to the appeal, a question arose as regards restitution under S. 583. Civil Procedure Code. The learned Judges hold that there could be no restitution in execution as the assignee was no party to the appeal. We think there is considerable force in the argument leading to that conclusion.

Indo Mati v. Gaya Prasad, I. L. R., 19 A., 142. We cannot understand what difficulty there was in this case, and the Judges appear to us to have been unnecessarily complicating matters by referring to S. 372 of the Civil Procedure Code. The last clause of S. 244 appears to render the question perfectly clear, for, a question as to whether a person is the representative of a party for purposes of execution is a question under S. 244 and the order is a decree under S. 2.

Gobind Chunder Nundy v. Srigobind Chowdhry, I. L. R., 24 C., 330. We have discussed elsewhere 2 M. L. J., 2, the question as to whether an action for contribution for costs will lie and the application of the principle of *Merryweather* v. *Nixan* to such cases. The setting up of a fraudulent defence to an action is not in itself a piece of wrong-doing which is actionable, and the rule that there is no contribution between wrongdoers has in terms no application to such a case. If the principle were in itself sound, there would be no objection to extending

it by analogy to cases where several defendants have conspired to make a false defence. But the wisdom of the rule in the leading case has itself been questioned. See 1 Smith's Leading Cases, p. 383.

Kailash Chandra Chuckerbutty *v.* **Kashi Chandra Chuckerbutty,** I. L. R., 24 C., 339. In this case the daughters of a Hindu, succession being governed by the Dayabhaga Law, entered into an arrangement among themselves whereby the share of each was not to lapse to the others on the death of any of them, but it was to continue in the line of her heirs. The Court held that this arrangement was good so long as it did not affect the rights of reversionary heirs except by way of accelerating their succession. The decision is perfectly sound, and it seems to us to be equally applicable to cases governed by Mitakshara law. It is competent to the holders of limited estates to consent to the alienation of the whole of their interest in any portion of the property during the period for which their estate would last.

Srinath Roy *v.* **Gadadhur Das,** I. L. R., 24 C., 348. The point raised in this case appears to be a new one. We are not aware of any decision as to the meaning of S. 59 of the Transfer of Property Act where it speaks of equitable mortgages by deposit of title-deeds in certain towns. Does the section refer to transactions taking place in those towns, or to transactions, wherever they may take place, which relate to property situated within those towns. These are the only two possible interpretations of the section. But we have no doubt that the obvious meaning of the wording is in favour of the former view. A third view may perhaps be suggested that the property should be situated and the transactions should also take place within the presidency towns. There are not enough words in the section for this.

Bhiram Ali Shaik Shikdar *v.* **Gopi Kanth Shaha,** I. L. R., 24 C., 355. The first question dealt with in this case is one of some importance; and, although the decision of that question is correct, we are not sure that the interpretation placed upon S. 244 is sound. The learned Judges observe that S. 244 bars a suit brought for the determination of certain questions, but it does not bar a trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him, and they proceed to distinguish S. 244 from S. 13 which bars the trial of any issue which might have been raised in the trial of a former suit. We are unable to accept this opinion as altogether satisfactory. There does not seem to be much warrant for placing this restricted interpretation upon S. 244, which precludes a separate suit at the instance of either party for the trial of any question (which certainly

includes issue) between the parties relating to the execution, &c., of the decree. The suit in this case was by the purchaser of the property for possession; and any question between such purchaser and the judgment-debtor is not a question relating to execution as pointed out by us in 1 M. L. J.

Latifunnessa *v.* **Dhan Kunwar**, I. L. R., 24 C., 382. We confess to share in the doubt expressed by *Ameer Ali*, J., as to the correctness of the decision in this case. The amount of the bond is expressed to be repayable in a certain month of a certain year, and stated to be six years from the date of the bond. We think that the specific date mentioned in the document, and not the date arrived at by calculating the period of six years from the date of the bond should be regarded as the date of the starting point.

Muhammad Abdul Majid *v.* **Muhammad Abdul Aziz**, I. L. R., 19 A., 155. The Privy Council in this case lay down the broad proposition that where a case raises several questions, it is competent to the Court to try some of them, reserving the determination of the others to a later stage. S. 212 of the Code expressly authorizes this in the case of a suit for possession of property and mesne profits, the question of mense profits being determinable at a later stage. S. 146 authorizes the Court to post a case for disposal upon the issues of law raised in the case, the issues of fact being reserved for determination at a later stage. The rule laid down by the Privy Council is general and beneficial.

Umardaraz Ali Khan *v.* **Wilayat Ali Khan**, I. L. R., 19 A., 165. A suit by some of the heirs of a Mohamadan against other heirs is not governed by Art. 123. That Article refers as pointed out by us in 2 M. L. J. and by the Madras High Court in *Sithamma* v. *Narayana*, I. L. R., 12 M., 487, to an action against an executor or administrator distributing the estate of the deceased. Nor does Art. 62 apply, for it is not a case of money received to the plaintiff's use ; for the defendant, being himself one of the heirs, is entitled to a share. Art. 120 has been rightly applied by the Court.

Amolak Ram *v.* **Lachmi Narain**, I. L. R., 19 A., 174. This decision has come upon us by surprise. The Transfer of Property Act has been in existence now for fifteen years, and we are surprised to be told at this time of day that there is anything in the Act which prevents an award of interest in a mortgage suit up to the actual date of realization. Act XIV of 1882, the Code of Civil Procedure, is an enactment even later than the Transfer of Property Act and S. 209 authorizes the

award of interest up to the date of payment. That section applies to every decree for money and a mortgage decree is certainly a decree for money also. Even if there were not S. 209, there would be no question as to the power of the Court to award such interest. If it is competent, therefore, for the court to decree the payment of interest up to the date of realization, such interest would be recoverable from the defendant or the proceeds of the sale of defendant's property even if the portion accruing beyond the date mentioned in the mortgage-decree be not a charge on the property. It would then be a combination of a mortgage decree with a simple money decree.

Ram Lal *v.* **Tulsa Kuar,** I. L. R., 19 A., 180. We think the decision in this case is perfectly sound. The learned Judges attempt to distinguish the case from *Kanara Kurup* v. *Govinda Kurup,* I. L. R., 16 M., 214, but they fail to notice that that case is overruled in *Vallabha Valiya Rajah* v. *Vedapuratha,* I. L. R., 19 M., 40. There is no doubt that a discretion is vested in the Court to extend the time at the instance of the mortgagor for payment of the mortgage money; and where good cause is shown the Court may extend the time, the extension not being obligatory in every case. Where no application has been made, the decree must operate according to its tenor.

Kashi Prasad *v.* **Sheo Sahai,** I. L. R., 19 A., 186. The decision in this case which proceeds upon the same principles as those laid down in *Amolak Ram* v. *Lachmi Narain, supra,* shows a most rigid adherence to the language of S. 86 of the Transfer of Property Act. But S. 86 was never intended to preclude an adjustment certified to the Court under S. 258 being carried out in execution if that was the intention of the parties, or an agreement to pay a larger sum in consideration of further time being given to the judgment-debtor being similarly enforced. This is acting upon the letter of the statute with a vengeance without taking other enactments about the subject into consideration.

In the matter of the petition of **Barkat,** I. L. R., 19 A. The principle that an accused person cannot be a witness is extended by *Blair,* J., to an affidavit in support of an application for revision of the sentence passed upon him. If he cannot depose as a witness, he cannot make an affidavit. Appeal and revision are simply further stages of the same criminal proceedings. So long as the disqualification to testify subsists it seems to us that no exception can be taken to this decision.

David Hay *v.* **Razi-ud-din,** I. L. R., 19 A., 202. This decision dissents from the conclusion of the Madras High Court expressed in

several cases, beginning with *Sami Achari* v. *Somasundram Achari*, I. L. R., 6 M., 119. We ourselves ventured to express our dissent from that conclusion in a long note in 2 M., L. J. We adhere to the opinion then expressed and hope that the question will be settled by the Privy Council soon.

SUMMARY OF RECENT CASES.

Contempt of Court—Breach of injunction by person not enjoined.

Seaward *v.* Paterson [1897, I, Ch., 545, C. A.]

The orders of a Court of Justice ought to be obeyed, and cannot be set at naught and violated by any member of the public, either by interfering with the officers of the Court or by assisting those who are bound by its orders. The Court has undoubted jurisdiction to commit for contempt a person not included in an injunction, who, knowing of it, aids and abets the person bound by the injunction in violating it.

Paterson was lessee of the first, second and third floors of a certain house, and his lease contained a covenant that he would not do or suffer anything which should tend to grow to be an annoyance or nuisance to the lessor or to other tenants of the lessor, or allow the premises to be used otherwise than as a private club. The ground floor of the house was occupied as a public house by one Dennigton. Paterson, contrary to the covenants in his lease, allowed his floors to be used as an arena for boxing matches. Dennigton thereon got an order of injunction from a Court of Justice prohibiting him from using his premises contrary to the covenants. But Paterson disobeyed the injunction and allowed boxing matches to be had on his premises even after the issue of the injunction, and in this he was assisted by the defendant who was fully aware of the proceedings against Paterson and of the injunction granted.

Held: that, although the defendant was not bound by the injunction and not liable for breach of it as such, he was still liable for contempt of court.

Public nuisance on private land—Owner responsible.

Attorney-General *v.* Tod Heatley [1897, I, Ch., 560 C. A.]

The law as propounded by the Judges in this case is rather too severe on owners of private property, and the right claimed for the public is so wide as to be unnecessarily inconvenient to private owners. Their

Lordships laid down in this case that an owner and occupier of property is under a strict duty to see that there is no public nuisance on his property, and this whether the nuisance was caused by himself or by any other person.

The defendant was owner of a vacant piece of land of about an acre in extent which he had inclosed by a hoarding six feet in height. The neighbourhood was inhabited chiefly by the poorer classes who were in the habit of throwing all their dirt and rubbish into this land over the hoarding and through breaches in it. Dead dogs and cats, vegetable refuse and such things had been thrown in and the whole site became a dreadful nuisance. The vestry sued by the Attorney-General for an injunction against the defendant to abate the nuisance. The defence was that the defendant had done all in his power to prevent people from throwing rubbish by putting a proper and sufficient hoarding, and that it was owing to the defective police and sanitary arrangements that the nuisance came into existence. The Court of Appeal held that the plaintiff was entitled to the injunction and the defendant was under a bounden duty to abate the nuisance, notwithstanding that it was caused by persons over whom he had no control. The question naturally arises, what is the owner to do under the above circumstances? Is he to keep watch and prosecute or sue for the benefit of the public every person whom he finds throwing rubbish on his land; apparently the rubbish is no nuisance to him so as to induce him to sue for his own benefit.

Vendor and purchaser—Implied covenants.

Broomfield *v.* **Williams** [1897, I, Ch., 602, C. A.]

This case is an application of the well-known doctrine that a grantor cannot derogate from his own grant; but great care must be taken in ascertaining what was actually granted in any particular case to which the principle has to be applied. The plaintiff bought a portion of some 'building land' from the defendant who was owner of it. The conveyance included a house built by the defendant with windows overlooking the land retained by him and referred to in the deed as 'building land.' But the conveyance contained no reservation of any right to enable the grantor so to build on the adjoining land as to darken the windows in the house which he had conveyed to the plaintiff. The defendant subsequently built a house on that land so close to the plaintiff's as to interfere with the access of light to his windows.

Held by the Court of Appeal that, on the principle that a grantor cannot derogate from his own grant, the plaintiff had *primâ facie* an

unrestricted right to light as against the defendent, and the burden of setting limits to that right lay on the defendant.

Swansborough v. *Coventry* [1832, 2 Moo. and Sc. 362,; 9 Bing, 305, approved of.

Birmingham, Dudley and District Banking Company v. *Ross* (1888) 38, Ch. D. 295, and *Myers* v. *Catterson* (1889) 43, Ch. D. 470, discussed and explained.

Inn-keeper—Common law liability.

Lamond *v.* **Richard** and **The Gordon Hotels,** Limited [1897, I, Q. B. 541, C. A.]

The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in as a traveller and given rooms, and she stayed there for a period of ten months. It was then intimated to her that she must leave the hotel, but this she refused to do. Then reasonable notice was given to her to leave, and on her still refusing to leave, advantage was taken of her absence from the hotel and her things were brought down and put outside, and on her return she was refused admittance. She then sued to recover damages for unlawfully ejecting her. The Court below had found that she was originally taken in by the hotel-keeper as a traveller, but that she subsequently ceased to have that capacity.

Held, that under the above circumstance the plaintiff must be non-suited. The common law liability of an inn-keeper to receive and lodge a guest attaches only as long as that guest is a traveller, and a person who has been received at an inn as a traveller may subsequently cease to be one. In determining whether his status has been so changed or not, the length of his stay at the hotel is one important consideration. If the guest has ceased to be a traveller, the inn-keeper is not bound to supply him any further and has a right to send him out after reasonable notice.

Public servant—Agent of the Crown—Limit of agency.

Dunn *v.* **Macdonald** [1897, I., Q. B. D., 555, C. A.]

In this case (*vide* p. 165 *ante* for facts) the Court of Appeal affirmed the decision of *Charles*, J., and held that the doctrine that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter

into the contract, is not applicable to a contract made by a public servant acting on behalf of the Crown. *Lord Esher*, M. R., said: "No action lies against a public servant upon any contract which he makes in that capacity, and an action will lie only upon an express personal contract. It cannot be pretended in this case that the defendant made any express personal contract, and there are decisions covering over a hundred years or more that, under such circumstances, he cannot be made liable."

Breach of contract, damages for—Effect of breach being caused by act of promisee.

Dodd *v.* **Churton** [1897, I., Q. D. 562, C. A.]

The action was to recover the balance due to the plaintiff, a builder, upon a building contract. The defendant made a counter-claim for money due to him as liquidated damages for non-completion of the work within the time specified by the contract. Under the contract the work was to be finished within a particular date, and in default, the builder was to pay £2 liquidated damages for every week's delay after the appointed time. There was also another stipulation in the contract, that any additional work which may be given should be specially paid for. It was admitted that extra work was ordered, and that the necessary result of the builder's having to do that work was that the original work was delayed. It was held by the Court of Appeal that the general rule applied that where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default and that the defendant's counter-claim must therefore be dismissed.

Divorce—Maintenance—Voluntary Allowance.

Bonsor v. **Bonsor** [1897, I, Probate Div., 77.]

On the petition of a wife there was a decree for dissolution of marriage, and on an application for permanent maintenance the Registrar reported thus: "The respondent has no means and is indebted to his brother in the sum of about £18,000, who nevertheless allows the respondent the sum of £60 as long as he stays outside this country; the respondent is also indebted to other persons in various sums, amounting together to £1,700," and he submitted that the respondent should be ordered to pay the petitioner the sum of £15 a month. Objection was taken to this by the respondent on the ground that the £60 allowed to him was only a voluntary allowance and ought not to be

taken into consideration in calculating the rate of maintenance. The objection was, however, overruled, and the President, *Sir F. H. Jeune*, held on the authorities that incomes over which the respondent had no legal claim may also be resorted to for the purpose of ascertaining the rate of maintenance.

He said:—"Nor can I see any reason why a wife on separation or divorce from her husband should not, in a proper case, have a share of any kind of income, in the whole of which she could have participated as his wife. Injustice to the husband is prevented by the provisions of the Act which allow the maintenance to be reduced or suspended, if his means of paying it fail. The report of the Registrar will therefore be confirmed with costs."

Estoppel—Limitation.

Dalton v. Fitzgerald [1897, I., Ch., 440, per *Stirling, J.*]

Where a grantor who has no title or only an imperfect title to a particular piece of land purports to grant it by deed to A for life with remainders over, and A enters under the deed and acquires a good title against the true owner, A is estopped as against those in remainder from disputing the validity of the deed; and the Statute of Limitations cannot also be called in aid, for they ought not to be so construed that a person claiming a life estate under a deed or will shall enter and then say that such possession was unlawful so as to give his heir a right against a remainderman. On this point the Master of the Rolls said in *Board v. Board* (L. R. 9, Q. B., 48.) ;—

"You have entered under the will of a man who had possession as far as you are concerned: possession is the fee: you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee . . . . You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle."

Care must, however, be taken to distinguish the above from another class of cases, namely, where a person having a good title to property, has not effectually devised it, and the tenant for life of other property effectually devised by the will has entered, just as if it had been validly devised and acquired by possession a valid title against the heir. There is a conflict of decisions with respect to this class of cases,

Estoppel—Company.

Frederick Bloomenthal *v.* **James Ford** (liquidator) [1897, Appeal Cases, 156.]

In 1894 the appellant, a stationer in the city of London, who had been supplying a certain limited company with stationery, was asked to lend the company £1,000, which he agreed to do upon the terms that he should have the company's acceptance for £1,000, and as collateral security 10,000 of the company's fully-paid shares of £1 each. The appellant advanced the money and received the company's acceptance for £1,000 and ten certificates. Each certificate stated that the appellant was the registered proprietor of 1,000 shares of £1 each in the company, numbered —— to ——, and "that on each of such shares the full amount had been paid." The shares that were thus handed over were really part of the unissued shares for which the public had not applied; but the appellant believed the representation on the certificates that they were fully paid-up shares till December 1894 when he was told by a friend that they were not so. He then gave notice of an application to the company to remove him from the list of shareholders. In the meantime the company had gone into winding up and the liquidator placed the appellant on the list of contributories with respect to the shares standing in his name:—

Held (reversing the decision of the Court of Appeal)

that the position of the appellant was not that of a member of the public who had applied for an allotment of shares and accepted an allotment under the impression that it created no liability, when in truth according to law it did create a liability;

that the transaction was one of a mere loan to the company who were to give as security "fully paid-up shares";

that as the appellant had advanced his money believing and acting upon the representation that the shares well fully paid, the company and the liquidator were estopped from alleging that the shares were not fully paid and that the appellant was entitled to have his name removed from the list of contributories.

The observations of Lord Herschell upon the doctrine of estoppel are really instructive, especially upon the question as to how far a person to whom a representation is made, is bound to enquire before believing and acting upon it.

Fiduciary relationship between Co-mortgagors—Power of sale of mortgagee —Sale to one of two co-mortgagors.

John Kennedy *v.* De Trafford [1897. Appeal Cases, 180.]

There is no fiduciary relation between two co-owners of real estate as such. The mere fact that one tenant-in-common collects and receives rents of the other tenant's moiety also at his request and manages the whole estate, does not create a relationship of trustee and *cestui que trust* between him and the other.

The only obligation that is incumbent upon a mortgagee exercising his power of sale is, that he should exercise it in good faith without any intention of dealing unfairly by his mortgagor. It is difficult to define exhaustively this good faith, as the circumstances of each case will have to be looked at for that purpose; but it does not amount to taking all reasonable precautions in the exercise of the power of sale.

D and K held certain real estate as tenants in common. They were co-owners each holding an undivided moiety. Both together mortgaged the whole estate to T. After the mortgage the whole estate was left in the possession of D in pursuance of a voluntary arrangement between him and K, under which he was to collect the rents and pay the money into a bank, and each was to draw on that account to the extent of his own moiety. After some time the mortgagee grew uneasy about his security and pressed his mortgagor for payment and finally gave notice to each of them separately that he would realize his security if he can obtain his principal, interest and costs; and that, unless they were prepared to pay him off, he would forthwith proceed to effect a sale by private treaty. To this K sent no reply. After a reasonable time from the date of this notice the mortgagee arranged with D for sale of the estate and sold it to him for principal, interest and costs. Subsequently K sued the mortgagee T, and D, his co-owner, to set aside the sale, or at least for a declaration that D's purchase was to his benefit to the extent of one moiety of it.

Held, that under the circumstances the sale by the mortgagees was one made in good faith;

that the fact of the management of the whole estate by D did not create a fiduciary relationship between him and K, and that neither under the general law nor under the circumstances of the particular case could D be considered trustee to K of one-half of the property purchased by him from the mortgagee.

The decision of the Court of Appeal [1896, I Ch. 762; 6 M. L. J. 282] affirmed.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Harvard Law Review for May and June (*in exchange*).

The Albany Law Journal for May and June (*in exchange*).

The University Law Review for May (*in exchange*).

The Educational Review for May (*in exchange*).

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The Green Bag for May and June (*in exchange*).

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Certain Suggestions of the Government of India in regard to Appeals in Civil Suits.

The following Judicial paper No. 5, Judicial, 390, addressed from the Secretary to the Government of India, to the Chief Secretary to the Government of Madras, dated Calcutta, the 30th March 1897, is published for general information.

"The attention of the Government of India has been called to the enormous, and apparently increasing, number of appeals in civil suits.

2. The total number of civil suits instituted in India in 1894 was 1,743,640. Of this number only 395,212 were contested, yet the appeals numbered 113,319, that is to say, about 30 per cent. of the contested cases, and about 6 per cent. of the total suits instituted were appealed.

An examination of the English statistics of 1894 shows that the number of suits instituted in inferior Courts in England was 1,136,042. The number of appeals was 289, that is to say, about one per 4,000, or ·000 25 per cent. In other words, for every appeal in England, there are 240 appeals in India. In comparing India with England, it must be borne in mind that in England there is no intermediate appeal, but that the appeal lies direct from the inferior Court to the High Court.

3. It appears from the Civil Justice reports that in 1894, there were 1,600,595 suits instituted outside the Presidency towns which were valued at sums not exceeding Rs. 500. If to those figures be added the cases disposed of by Presidency Small Cause Courts, it seems that the great mass of Indian litigation is concerned with small causes which in England would be dealt with by the County Courts in the exercise of their summary jurisdiction. According to the returns for 1895, there were in that year 1,179 appeals (first appeals 7, second appeals 1,172) to the High Court at Calcutta in cases where the value of the suit did

not exceed Rs. 100. The corresponding figures in Madras were 893 (first appeals 17, second appeals 876), at Allahabad 436 (first appeals 5, second appeals 431). The number of appeals below this value filed in the High Court at Bombay is not ascertainable from the Civil Justice returns.

4. It appears to the Government of India that the present license of almost unlimited appeal may be considerably reduced with great advantage, not only to the litigants, but also to the courts of first instance and the appellate courts.

Protracted litigation gives the man with the larger purse an unfair advantage, and it has been recognized in the Small Cause Court Acts that there are important classes of cases in which a quick and decisive settlement of disputes is the paramount consideration. Under the existing system the courts of first instance feel no responsibility beyond escaping the censure of the courts above them, to which they know their decisions will be appealed, and tend to become timid and technical, and the High Courts in their turn, instead of having the leisure for the deliberate disposal of really-important issues, are burdened with a host of petty and often frivolous cases which should be settled by courts of a lower dignity.

5. Several suggestions have been made to the Government of India for limiting the right of appeal and reducing it within reasonable limits. The Government of India recognize that the circumstances of the different provinces of India are so various that it might not be expedient to enact a uniform rule. Much must depend on the relative trustworthiness and legal attainments of the lower Courts, and the habits and wishes of the people constitute also a material factor in the case. In these circumstances it is possible that a suggestion which might be suitable for one province might not be entirely suited for another. With these remarks I am to commend to the attention of the Governor in Council the suggestions enumerated below, and to request that the Government of India may be favoured with the opinion of His Excellency in Council as to their applicability to the Madras Presidency with any further remarks that His Excellency in Council may think fit to offer.

(1) That where appeals from lower Courts are heard by a single Judge of the Court, there should be no appeal from this decision, under the Letters Patent or otherwise, except by leave of the Judge.

(2) That in original suits heard by a single Judge of the High Court, where the value of the subject-matter does not exceed (say)

Rs. 2,000, there should be no appeal from his decision or from any interlocutory order unless by leave of the Judge. For this purpose an application for a new trial would be included in the term appeal.

(3) That in cases where the amount involved is large (say, Rs. 10,000 where an appeal lies to the Privy Council) and an appeal is a practical certainty, the parties should have the option of commencing the suit in the High Court.

(4) That security for costs should be given in every appeal unless the court, for good reason, dispenses with it, and that where there is a second appeal from concurrent decisions, substantial security should always be given.

(5) That the power of revision conferred on the High Courts by section 622 of the Code of Civil Procedure should be curtailed, and that this jurisdiction should be confined to cases where the High Court in England could issue a mandamus or prohibition.

(6) That except by leave and except in certain cases affecting land, there should be no second appeal where the value of the suit does not exceed some fixed limit, say, Rs. 500.

(7) That appeals on questions of procedure should be cut down, and that except by leave there should be no second appeal on any question of procedure.

(8) That in the Presidency towns, where the Small Cause Courts have Barrister-Judges, those Courts should be remodelled on the English County Court plan, that is to say, that the jurisdiction as to the class of suits cognizable by them should be enlarged and that the English summary procedure should be adopted.

(9) That Small Cause Court powers should be more freely conferred on the mufassal courts, and that all suits for liquidated demands within the pecuniary limits of their jurisdiction should be cognizable by them.

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Charging the Jury.—The numerous comments made in newspapers and legal periodicals upon the charge to the jury in the trial of the Bram murder case, and upon the opinion of the court on refusing a new trial, bring into notice the marked difference in practice between the Federal courts and most State courts with respect to the judge's commenting upon the evidence in the charge. There can be little doubt

that the charge in this case was entirely unexceptionable, according to the rule laid down in the Federal courts. Following the established English rule, the Supreme Court of the United States has often held that it is proper for the judge, and sometimes even incumbent upon him, to express in his charge to the jury his own opinion of the weight of the evidence that has been offered, and of the facts which he considers it to prove, provided always that he clearly instructs the jury that the determination of all questions of fact is left to their own independent judgment. In almost all State jurisdictions, on the other hand, an increasing jealousy of the possible influence of the judge upon the jury's verdict has by various means made any expression of opinion by the judge upon questions of fact a ground for exceptions. In several States, such as Arkansas, California, Nevada, South Carolina, Tennessee, and Washington, any comment upon the evidence by judges in charging a jury, is prohibited by the State Constitution. In very many other States, of which Massachusetts is one, the same result is reached by a statute. To allow exceptions upon such grounds, in the absence of any statutory provision, would seem to be an unwarrantable departure from the old common law view, which was that it was the duty of the judge to assist the jury in the determination of matters of fact by his advice, founded on his extensive experience and his superior training in habits of logical thought. How positive and urgent such advice may be, when the jury are at the same time instructed that the final decision is left entirely to their judgment, is a question which must always depend to some extent on the temper of the courts, and of the community in which they administer justice; and accordingly even the Federal courts are more inclined to restrict the action of judges in this respect than are the English courts. The effect of the statutes referred to is to prevent the court from in any way aiding the jury in the determination of matters of fact, and to render it extremely difficult for a judge to sum up the evidence without laying his charge open to exceptions. It is certainly the opinion of many lawyers that juries are more apt to go wrong in their verdicts under this rule of practice than under the rule of the Federal and of the English courts. It would perhaps be well for those who are anxious for the preservation of the jury system, at a time when much dissatisfaction is felt with its practical operation, to consider whether the danger of judges influencing juries to give unjust verdicts is so serious as to make it advisable to diminish the practical efficiency of jury trials by preventing the judge from giving the jury the benefit of his generally superior powers of reasoning and wide experience in the facts of cases;—*Harvard Law Review.*

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Locality of Crime.—The Court of Appeals of Kentucky, in the recent case of *Jackson* v. *Commonwealth*, 38 S. W. Rep. 1091, has had to deal with the question of the criminal intent and the locality of crime in a difficult form. In Ohio, the defendants administered cocaine to a young woman, intending serious bodily harm. They brought the apparently lifeless body into Kentucky, and, in order to conceal the crime, cut off the head, believing that she was already dead. But the evidence shows that, until the decapitation, she was alive; and the question is raised whether the crime of murder was committed within the jurisdiction of Kentucky.

The prisoners were convicted; and in sustaining the conviction the court is right, although the reasoning is not entirely satisfactory. The fact that the poison was administered in Ohio offers little difficulty. The girl did not die of the poison; she died from the act of violence which took place in Kentucky. Apart from this, two difficulties are to be met before we reach the same conclusion as the court. The act causing death in Kentucky is present; but to constitute the crime of murder, there must be also the general criminal intent and the malice aforethought. If we can find the crime of homicide, we have the requisite malice, in its technical significance, from the fact that a dangerous weapon was used. But it is urged that there was no general criminal intent, for the killing was done under a mistake of fact; and, further, that it is impossible to consider what took place in Ohio with reference to the act done in Kentucky. To this there are two answers. In the first place, the act of decapitation itself was criminal, the wanton desecration of a dead body being looked upon as *contra bonos mores;* this alone is sufficient to supply the intent. But even were this not true, the general criminal intent may be supplied constructively from the criminal intent to poison. This is the ground the court takes. As evidence of this intent, acts in another State may be considered. Intent does not depend upon jurisdiction; it is a mental quantity, evidence of which may be received from any part of the globe. And as for the existence of the intent at the time of the killing, it would be a strange anomaly if it were law that the wicked state of a man's mind ceases as soon as he believes in the death of his victim, so that he is not responsible for the actual harm resulting from continued indignities. His particular acts may not accomplish the end he contemplates; but by construction the criminal intent is continuous, until the last step is taken in finishing the crime and in concealing its traces. Therefore, in this way too the general criminal intent existed at the time of the killing; and that intent, together with the "malice" implied from the use of a dangerous weapon, makes the act which was done murder.

This result is sanctioned by justice as well as by logic; for otherwise an atrocious murder, owing to an error in its commission, would be nowhere punishable,—not in Ohio, because the poisoning which took place there did not result in death,—not in Kentucky, because the criminality of the act would be held to have ceased before the death:—*Harvard Law Review.*

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Limitation of the Right of Self-defence.—In the case of *Dabney* v. *State*, 21 So. Rep. 211, the Supreme Court of Alabama has placed a new restriction upon the right of self-defence. The trial judge instructed the jury, in a trial for murder, that if the defendant went to another's house, intending illicit intercourse with that other's wife, and armed himself, though merely for defence in case of attack, he was deprived of the right to kill in self-defence. The Supreme Court supports this position; in fact, the language of the court implies that in any case a man taken in adultery with another's wife cannot justify himself in killing the husband even in self-defence. There is no doubt that, if the defendant committed the wrongful act with the express purpose of creating an occasion for killing, he forfeited the right. In the absence of this express purpose the question is: Did the act amount in law to a provocation, and was the attack in fact provoked thereby? The court rightly answers, Yes. That the law recognizes adultery as provocation for an assault by the husband is shown by the fact that, if death results, the husband is held guilty not of murder but of manslaughter. It is a firmly established principle, that he who provokes an attack is not justified in taking life to protect his own. Although in this case the defendant's motive was not to cause the affray, he voluntarily entered upon an act which the law holds to be a provocation, and which did in fact provoke the conflict that took place. Under these circumstances, the court was right in holding that he could not avail himself of the right of self-defence.

The court then proceeds to support the charge on other grounds: one who enters on a wrongful act, and contemplating interference on the part of another arms himself with a deadly weapon, in order to take the other's life if necessary to save his own, is guilty of murder if he kills. This cannot be supported. The fact that the defendant armed himself merely in view of defending himself cannot militate against him, except as bearing upon his knowledge of the possibility of his being attacked. Does then the fact that a wrongdoer knows that the act may lead another wrongfully to attack him necessarily deprive him

of the right of self-defence? It would seem that this hardly can be so. In applying the rule, confusion arises in many cases from a loose use of the word "provoke." If the defendant knew that trouble might arise, and yet persisted in his act, he might be said to have "provoked," in the sense of "given rise to," the affray. But did he in the legal sense provoke an attack? Was his act legally to be regarded as provocation of the murderous assault? Although not supported by the majority of the cases, the court of Kentucky is right in saying that a defendant killing in self-defence is not guilty unless he made it necessary or excusable for the deceased to put him in danger. *Thompson* v. *Commonwealth*, 26 S. W. Rep. 1100. The conviction here was rightly affirmed, not because the defendant armed himself against a probable attack in the course of his wrongdoing but because his wrong was a provocation of the attack upon him:—*Harvard Law Review.*

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Great English Judges.—Lord Chancellors.—"The golden period of equity" is the phrase often used in describing the years from 1737 to 1756, when Philip Yorke, Lord Hardwicke, was the presiding genius in the Court of Chancery. He disposed of the many causes which came before him with a rapidity and accuracy which gave wide satisfaction, and in so doing laid down general principles which "perfected English equity into a symmetrical system." Lord Hardwicke's manner in court approached the ideal. A patient, eager listener, willing to be instructed by counsel, and giving his undivided attention to the argument, he made up his mind only after hearing both sides, and expressed his opinions in carefully prepared written judgments. A pure and fearless judge, he had a sincere passion to advance the science of law. As a man, Lord Hardwicke is scarcely so much to be admired. Determined to get on in the world, from early youth he was relentlessly successful. No failures and no follies mark his steady advance along the path to the Woolsack through the positions of Solicitor-General, Attorney-General, and Chief Justice to the King's Bench. He seems to have resolutely shut out from his life all which could not aid his ambition. Avaricious, arrogant in society, he forgot his own humble birth, he forgot old friends who had helped him, and sought and cared only for the rich and the great. In politics Hardwicke was a Whig, and was almost as able as a statesman as he was splendid as a judge. During Newcastle's ministry he was virtually the head of the nation. Lord Hardwicke was strikingly handsome, and to his personal attractiveness much of his early success was due.

A small, well-featured man, sitting on the bench with an air of dignified repose which did not betray that he was paying little attention to the rambling and unchecked arguments of the counsel before him; patiently amusing himself with his private correspondence till the causes of the day were over, then taking all the papers involved to be considered at his leisure; finally, having been at greatest pains and labor to reach a decision in each case, delivering, often years after the cause was first heard, judgments which were generally spoken without the aid of a single note;—such was perhaps the most famous of Chancellors, John Scott, Lord Eldon. With the exception of the year 1806, he presided in Chancery from 1801 to 1827. His prevailing characteristics as a judge were a sincere desire to do justice between man and man and an almost exaggerated fear of erring either as to law or facts. Although, combined with his naturally dilatory habits, these attributes made the delays in Chancery matter of common reproach and ridicule, they resulted in an almost unbroken line of fair and correct decisions. Lord Eldon's private life was not lacking in romantic incident. He came from a poor and humble family, narrowly escaped first the career of a coal-fitter, and later that of a country parson; he eloped with his wife in genuine story-book fashion, taking her from her second story window by means of a ladder one dark night; and he finally became a master of English law by hard and unremitting study. Eldon was, however, versed only in law. He knew nothing of general literature, had no imagination or artistic sense, and when not attending to state or judicial business preferred the society of his inferiors to that of men and women of wit and understanding. As a statesman he was distinguished for his bitter hatred of the Catholics and his violent opposition to every species of reform.

For a brief period in 1868, and again from 1874 to 1880, the head of the English judicial system was Hugh McCalmont Cairns, Lord Cairns. He is considered by many to have been the ablest lawyer of his time. He was not, however, deeply versed in black-letter learning, like Willes and Blackburn, but was distinguished rather for his exhaustive discussion of a matter on principle. His great attribute was lucidity. Probably no other judge of any time has possessed a power of clear statement equal to that of Lord Cairns. One of his biographers has described his appearance in court to be "cold, impersonal, like an intellectual machine minting law." Though born in Ireland, Lord Cairns was of a Scotch family, and was through life an ardent evangelical churchman. His great piety is said to have been something of a jest among members of the bar, and to have been traded upon by the unscrupulous, like the

vice of another man. He was almost as great a statesman as a judge, and he was influential in passing the Judicature Acts. He took his recreation in the hunting field on Saturdays and in shooting on the moors of Scotland in the vacation. His great career is the more remarkable in view of the fact that he had to struggle continually with physical weakness and illness, and to take constant precautions in order to be fit for any work:—*Harvard Law Review.*

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Conflict of Laws—Domicile—Divorce.—A wife left her husband in New York and went into another State, where she secured a divorce and married another man. She then returned with him to the State of her former husband. *Held*, that the divorce and subsequent marriage were void. *McGown* v. *McGown*, 43 N. Y. Supp. 745.

It is generally conceded that a wife cannot acquire of her own accord a separate domicile from her husband's. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; and as it is settled law that a divorce can be obtained only at the domicile, it was not improper to regard this divorce as invalid. 1 Bishop, Mar., Div., and Sep. § 837. And while it is the rule that the validity of marriage is determined by the law of the place of its consummation, Story, Conflict of Laws, 6th ed., § 113, for the New York court to recognize the subsequent marriage would be to consider the woman in the impossible relation of wife to two husbands. Story, *ib.*, § 373 *f*:—*Harvard Law Review.*

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Criminal Law—Insanity—Burden of Proof.—*Held*, on a trial for murder, where the defence is insanity, the burden of proving such defence is on the defendant, but he is not required to establish his defence beyond a reasonable doubt. *State* v. *Larkin*, 47 Pac. Rep. 945 (Idaho).

The ruling in this case and in the similar recent case of *State* v. *Scott*, 21 So. Rep. 272 (Ala.), is in accord with the practice in most States and with the majority of the text writers on the point. The rule is, however, a disputed one, and the better law would seem to be that of Michigan (*People* v. *Garbutt*, 17 Mich. 9) and several other States, as well as that of the Federal courts (*Davis* v. *U. S.*, 160 U. S. 469). These hold that the burden is upon the prosecution of proving both the elements of the crime, *viz.*, the act and the intent to commit; and that while the general presumption is that the latter is present, if the accused brings forward any evidence tending to put that question in doubt, the necessity for proof of this part of its case by the State is equal with that of proving the act itself:—*Harvard Law Review.*

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Criminal Law—Self-defence.—Where defendant and his companions with guns in their hands unlawfully entered a house in which deceased was a guest, and were ordered out by the latter, who followed them to the door, and was shot, an instruction that if the defendant in good faith abandoned the difficulty and was leaving the house, and deceased followed and pointed his gun, defendant had a right to defend himself even to taking life, if necessary, was properly refused. *Crawford* v. *State*, 21 So. Rep. 214 (Ala).

The point of law is beyond dispute that a person cannot justify a homicide by the plea of self-defence, if the necessity for it results from his own wrongful act. But it is also equally well established that, if a person in good faith retires, he acquires the right of self-defence if assailed by the one he had previously attacked. The ruling in this case, that the withdrawal must be manifest, seems good law. The defendant having put the life of the deceased so in peril that he is under the necessity of using force, even to death, to defend himself, ought at his own peril to make it plain that that necessity no longer exists. This view is supported by *Parker* v. *State*, 7 So. Rep. 91 (Ala) :—*Harvard Law Review.*

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Evidence—Opinion—Mental—Condition.—A witness, after stating many facts relating to a testator's conduct, and that the testator was personally known to him, was asked whether in his opinion the testator was competent to transact ordinary business. *Held*, that the answer was inadmissible as a conclusion involving expert knowledge. *Torrey* v. *Burney*, 21 So. Rep. 348 (Ala).

By the better considered cases, a non-expert is now allowed to express his opinion as to one's insanity, provided he has set before the court sufficient facts on which to base his opinion. The decision in the principal case might well have been otherwise. The question asked was not a hypothetical one. Sufficient facts had been testified to by the witness, and he should have been allowed to state the impression they had made on his mind. This is opinion in form only; in substance it is a statement of fact. *Life Ins. Co.* v. *Lathrop*, 111 U. S. 612. It is difficult to see, on the facts of the principal case, any valid distinction between a question as to one's insanity and the question as to his competency. See *Wright* v. *Doe d. Tatham*, 5 Cl. & F. 670 :—*Harvard Law Review.*

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Quasi-contracts—Agent's compensation for services after principal's death.—A principal employed an agent to collect his rents and to care

for his real estate. The principal died intestate, and left no known heirs. The agent, with knowledge of the principal's death, continued to collect the rents and to care for the real estate. *Held*, that the decedent's estate must pay for these services. *In re Bryant's Estate*, 36 Atl. Rep. 738 (Pa).

As death revoked the agency, and as there were no circumstances indicating ratification, the recovery must be worked out upon theories of quasi-contract. The requirements essential to a quasi-contractual recovery were present in this case, according to the court's view of the facts. Obviously, the former agent did not intend to serve without compensation. Obviously, too, he was no mere meddler; for, as the court explains, in the extraodinary state of facts he owed "at least a moral duty to look after the property for the real owner, whoever he might prove to be." Finally, the fact that the estate was actually benefited is apparently taken for granted in the court's statement that, according to the finding of the court below, the former agent "had rendered services to the estate." Indeed, though there is a surprising dearth of authority, it seems clear that the court's view of the law is correct, though there certainly is a question whether the facts indicate that the estate was benefited in the least. The facts are more fully reported at an earlier stage of the case, in 35 Atl. Rep. 571, and 176 Pa. 309:—*Harvard Law Review*.

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Torts—Public Nuisance—Special Damage.—The defendant had unlawfully erected a fish trap in a navigable stream in such a way as to obstruct navigation and prevent the plaintiff from carrying on his business of fishing. *Held*, that the plaintiff suffered special damage, so that he was entitled to an injunction against such obstruction. *Morris* v. *Graham*, 47 Pac. Rep. 752 (Wash.).

The rule is generally stated to be, that, in order to give a private right of action for a public nuisance, the damage must be different in kind, not merely in degree, from that suffered by the public. Here the plaintiff was prevented from plying his customary trade, and in that his loss differed in kind from that of the public. The fact that the public also had the right to fish in the stream is immaterial, because they had never exercised it, and would suffer no loss, except in contemplation from its being interfered with. *Mill Co.* v. *Post*, 50 Fed. Rep. 429 *Rose* v. *Miles*, 4 M. & S. 101:—*Harvard Law Review*.

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We take the liberty of extracting the following from an interesting article styled "Her Majesty's Royal Courts of Justice" that appeared in the Albany Law Journal:—

What the London Barrister must do in order to be qualified to practice in them. An expensive course of training with the eating of many dinners necessary—An interesting and instructive interview with Mr. Sidney Phipson.

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Qualification.

One of the first things I elicited from Mr. Phipson was that eight out of every ten barristers are college men. A university education seems to be almost a necessity. Very few successfully dispense with it. The preliminary training for the profession may be commenced at college. A barrister must have passed at least three examinations—

(1) Ordinary college examination in classics and general subjects;

(2) first examination in law called "Roman Law" examination;

(3) second and final law examination.

A college man will, in the usual course, secure the first of these, and by taking an "honors" degree of D. C. L. at Oxford, or LL. D. at Cambridge or London, will be excused the second or Roman law examination. If he only achieves an "ordinary" degree, he must still tackle the ordeal of "Roman Law." All non-collegiates, before they can study for the bar, must pass in classics and general subjects.

But, whoever they may be or whatever they may have done, all aspirants to the honor of wig and gown, whether collegiate or non-collegiate, must, subject to their satisfying the Boards of Examiners in Roman law, spend a three years' probation in one or other of the inns of court. The inns are four in number: Lincoln's Inn, Gray's Inn, the Middle Temple and the Inner Temple. They may be briefly described as societies or colleges for the study of the law, and are of ancient origin. Second to none in their jealous regard for the observance of professional tradition and etiquette, the inns maintain a strict watch over the attendances and behavior of the students. To insure that none of them shirk the obligation of duly "serving their time," a system of checking attendance exists, commonly known as "Eating Dinners in Hall."

The legal year is divided into four terms: Hilary, Easter, Trinity and Michaelmas. Three dinners in each term, or a total of thirty-six

during the three years' probation, have to be eaten at the Inn Hall by every college man. Non-collegiates must tackle twice this number, or seventy-two total attendance at these dinners is checked by the "janitors," who keep the door and tick off each man's name as he enters. In one respect these janitors are remarkable men. Long practice has trained their memories to such perfection that among all the hundreds of dinners, no member, however erratic in his intervals of attendance, is ever met with a second request for his name from the same doorkeeper.

THREE YEARS' DINNERS.

The first two years of the student's inn membership are occupied in general study and coaching for his final examination. He never finds much difficulty in procuring professional tuition. Many impecunious members of the bar, who find time hang heavily on their hands, are only too willing to proffer their services in this direction for moderate fees.

Having duly passed his examinations, the student must devote the last year of his inn-dwelling to the somewhat expensive pastime known as "Reading in Chambers." The explanation of this, with its rather misleading title, is simply that he secures the free run of some practicing barrister's office, with liberty to scan all the briefs and watch the procedure. For this he has to pay the barrister the substantial fee of one hundred guineas ($525). At first sight it would seem safe to say that this must be a very valuable experience for the beginner. As a matter of fact, in the majority of cases, it is little better than a farce. To begin with, he generally shares the privilege with some half-dozen others. The barrister, as a rule, is a busy man, who has little time to waste over struggling readers. The consequence is they really get precious little for their money. They are supposed to make themselves acquainted with the details of every case that comes in, but it more frequently happens that long before they have had time to properly ascertain what a brief is about, let alone master its contents, the clerk annexes it for hurried conveyance to the law courts.

Notwithstanding the somewhat farcical nature of these proceedings, twelve months' experience of them is gravely considered as duly qualifying the student for a "call to the bar." This is quite a simple affair, involving but little ceremony. On a given date the governing body of the inn, known as the benchers assemble in the hall. The qualified students, having received written intimation of the event, meet them there, eat and drink at the benchers' expense, and afterward attend a sort of reception. The senior candidate makes a eulogistic speech,

receives a courteous rejoinder and the process is complete. Henceforth the new-fledged barrister, having provided himself with wig and gown, enjoys the freedom of Her Majesty's courts, and may begin to look about for business.

FINANCES.

If, like a prudent business man, he sits down now to take a retrospective survey of his financial position, he finds that his out-of-pocket expenses up to this point have reached a total of about $1,375. This includes a stamp fee of $250, which he has to pay to Her Majesty's exchequer for the privilege of addressing a British judge and jury. It also includes the $525 "reading" fee and all the incidental expenses attached to the routine of inn life. But it makes no allowance for the cost of maintaining himself during the long and tedious sojourn in the wilderness of probation.

There is an old saying in legal circles that "to succeed, a barrister must marry a rich solicitor's daughter," a theory which Mr. W. S. Gilbert has satirized in his "Trial by Jury." But there are one or two alternatives to this desperate expedient. The most promising one for the young beginner to adopt is—to join the ranks of the "devils." This, as an alternative to wedded wealth, is not such an infernal jest as it sounds. A legal "devil" is one who, attaching himself to some barrister in full practice, undertakes, in return for the experience thereby acquired, to assist him in routine work, to arrange details, collect figures, look up precedents and generally make himself useful. This arrangement has very great advantages for the beginner. He gets a thorough insight into practical work, and if at all energetic and wide awake, soon begins to make his mark. He gets no salary, but if his senior is practicing in the "Equity" division he is entitled to half the fees. In the "Common Law" division he would have no such right, but in either case the value of the experience gained more than repays him. To be "devil" to a popular man is a much-envied position. The attorney-general's devil is practically sure of a judgeship in time to come. Mr. Justice Wright and Lord Justice Smith are instances of attorney-general's "devils."

At the present day there are almost as many "special" branches in law practice as in the musical world. But the aspiring barrister cannot pick and choose. He must await his chance, and adapt himself to the sphere into which the tide may float him. Very few of the successful men of the present day occupy positions in that particular department of law practice to which they originally turned.

REAL BEGINNING.

After the "devil" has established a certain reputation and qualified himself for a sphere of independence, he may rent offices, engage a clerk and launch out "on his own." He would not take such a speculative step, however, until he had made something of a name and secured a measure of influence among the solicitors. And here let me say a word or two as to the position of solicitors and their relation to the barristers. The preliminary legal training is much the same in both cases. An intimate acquaintance with the vagaries of English law is essential. But barristers ascend to a higher grade of privilege, into which solicitors may not trespass. No solicitor is allowed to plead in any of the high courts. He may address the magistrates or minor judges of police and county courts, but before the robed dignitaries of Her Majesty's royal courts of justice he must be silent. The privilege of raising the persuasive voice of eloquence is reserved exclusively to the fraternity of wig and gown. The social position also of solicitors is distinctly inferior. Very few of them are university men. Their ranks are recruited chiefly from that section of the community which has come to be known as the "middle classes." Exceptions there are, of course. A few names could be mentioned that shine with the lustre of well-earned wealth and social influence. But they are not many, inasmuch as the profession has not that opportunity of attracting the public gaze which is the coveted possession of successful barristers.

But if the popularity of a Sir Frank Lockwood or a Sir Edward Clarke is denied them, solicitors have their compensating advantages. The inexorable law of etiquette forbids a barrister taking up a case except through the medium of a solicitor's "brief." In criminal cases this rule may be relaxed, but such an occurrence is rare. The best-known exceptions are those in which a judge requests some member of the bar present in court to defend a prisoner charged with murder or other serious crime, who has been unable, through poverty, to engage a lawyer on his own behalf.

BRIEFS AND FEES.

The brief is a document setting forth in detail all the facts and history of a case. In big *causes celébrès*, the brief sometimes attains a prodigious bulk. The mastering of its contents is an operation associated in the public mind with much burning of midnight oil. But this is a fallacy for which novelists are largely responsible. A barrister who knows his business will master a brief, however voluminous, at one reading. Long practice enables him to extract the salient points and determine at once the proper course to be pursued. Many eminent members of the bar will read half a dozen briefs in the morning before

going into court. When they have once perused and underscored them with their blue or red pencils, they may be relied upon to conduct the case in their usual masterly style, with no prompting whatever. Frequently they may be seen in court studying the points in one case while conducting another.

Barristers' fees are a variable quantity. As viewed in a solicitor's bill of costs, they look somewhat mysterious. A barrister's guinea is always £1 3*s*. 6*d*.; two guineas are invariably £2 7*d*., and so on. This is explained by the fact that he charges a supplementary fee for his clerk at the rate of 2*s*. 6*d*. for every guinea he earns. No fee is less than a guinea. An unwritten law, dating from the time when the guinea was a coin of the realm, decrees that barristers must not accept silver. One transgression of this rule is recorded. A somewhat impecunious member of the profession accepted a few shillings as payment from a poor client. He was promptly called before the benchers of the inn to explain. His plea was, if he did not take gold, he at least took all the man had got, whereupon he was at once honorably acquitted. It was impossible to cavil at such a worthy upholding of all the traditions of the profession! Like physicians, barristers cannot recover their dues at law. The fee is supposed to be an "honorarium" which was not expected. There is a quaint survival of the alleged sensitiveness of barristers about fees. In their gowns may still be noticed a sort of long, narrow pocket arrangement, hanging down at the back of the left shoulder. Its occupation is gone now, but in the old time it was the recognized receptacle for the guineas which were supposed to be dropped in surreptitiously by the client. Very different is the brazen effrontery of these days, when eminent pleaders will calmly demand their fifty guineas "retainer" to induce them even to look at the proffered brief.

AS A Q. C.

A career of continued prominence and success may culminate at last in a desire on the part of the barrister to exchange his stuff gown for the silk robe of "one of Her Majesty's Counsel learned in the law." Now, this is an honor which, so far from being eagerly accepted as soon as offered, requires the utmost care and consideration. To use Mr. Phipson's graphic phrase, "It is a tremendous leap in the dark." A successful barrister may utterly fail as Queen's Counsel. The change may be likened unto a doctor giving up a lucrative practice in one town for another and entirely fresh one somewhere else. It is simply a speculation. Inasmuch as the laws of professional etiquette forbid him doing "junior's" work, he has practically to begin again and work up an entirely fresh connection. For this reason it is not uncommon for successful barristers to fight shy of the new dignity, preferring their substantial bird in the hand to any two speculative ones in the bush.

Should he decide to make the venture, his first step is to send in an application to the Lord Chancellor. In due time he receives an intimation that he has "been selected," and a request to wait on the Lord Chancellor at the house of lords on a given date to be sworn in. Next comes a demand from the Clerk of the Crown for the payment of fees amounting to £60 12*s*. A full-bottomed wig and a silk gown are the next indispensable items, the total cost of which varies from twenty guineas to twenty-five guineas. Add to this a full court livery, consisting of coat and vest, knee breeches, black silk stockings, dancing pumps, with steel buckles, white kid gloves and white dress tie, and you have the complete necessary outfit for a new Queen's Counsel. Having donned all this paraphernalia, and incidentally provided a new silk hat for his clerk, he joins the assemblage of other applicants in an ante-chamber at the House of Lords. Taking his turn in order of seniority, and attended by his clerk, he proceeds into the Lord Chancellor's room, where that great legal dignitary of the Crown, arrayed in plain clothes, is waiting to receive him. The Chancellor's clerk reads aloud a declaration of loyal service, etc.," which the embroyo Q. C. repeats after him. The Lord Chancellor then presents him with a crimson leather box, containing the "patent," engrossed on vellum, and sealed with the great seal of England. They then shake hands in solemn silence, no word having been spoken except the declaration.

This part of the ceremony completed, the new Q. C. proceeds at once to the law courts. He pays a visit to all the courts in order of their legal seniority, that happen to be sitting. The business in progress is abruptly interrupted by his entrance. The court usher rushes to the barrier gate and closes it. The presiding judge, having been provided with the new counsel's name on a piece of paper, delivers himself with grave solemnity of the following formula :—

"Mr.——, Her Majesty having been pleased to appoint you one of her counsel learned in the law, you will take your seat within the bar accordingly.

The barrier gate is thrown open; the Q. C. passes into the front row and bows to the judge, who bows in return. He then turns right about face and bows to the counsel present, who acknowledge the courtesy. Finally he bows to the junior barristers, who reciprocate the compliment. He then sits down. The judge asks, "Do you move, Mr.——?" Rising and again bowing, he answers, "No, my lord," and forthwith leaves the court. Having inflicted this ordeal on all the other courts, the new counsel is now regarded as duly initiated into the mysteries of the craft. All that remains for him to do is to have some large cards printed with

his name and the words. "On appointment as one of Her Majesty's counsel," in one corner. He leaves one of these with each judge, and is now free to come and go as he pleases.

The ultimate goal of a Queen's Counsel's ambition may vary according to his own taste and character. He may struggle for that avenue of legal dignity which leads from the judge's bench through the Supreme Courts of the Lords of Appeal to the Woolsack of the High Chancellor. Such a career is graced with unlimited dignities, but limited salaries. On the other hand, there are some few shining lights of the profession who possess a happy combination of great ability, a practical and democratic mind, a strength of will enabling them to resist the glamour of pomp and state, and, above all, a capacity for seizing upon their opportunities. Such men rapidly attain a position which enables them, financially speaking, to look down upon Her Majesty's judges and law lords, and even the High Chancellor himself. By the magic of their genius and boundless energy they reach and sustain themselves at the high-water mark of professional prosperity.

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Historic Collisions Between Bench and Bar.

The remark of Mr. Oswald, in his interesting work on "Contempt of Court," that good feeling nearly always existed between bench and bar in England, and when it is interrupted, the reason for it may generally be found to exist on both sides, is pretty nearly correct. He finds scarcely a case on record in the Superior Courts of a conflict between the bench and the bar becoming so acute as to lead to the committal of an advocate for contempt, while conducting his client's cause. Even Chief Justice Jeffreys, who is said to have on more than one occasion browbeaten and threatened counsel, does not appear to have put in force the power of committal against counsel. "The natural disinclination of the court to interfere with counsel in such a way as to take his services from his client," Mr. Oswald well remarks, "ought to from a strong reason for counsel not assuming too great a license." The London Law Times concludes that it would be difficult to find a clear case of a barrister being punished for contempt while actually pleading for his client in Court.

There are some historic precedents of impassioned dialogue between the representatives of the two orders. To begin with, there is the classic story of Wedderburn in 1757. Lockhart, being against him in the Inner House at Edinburg, showed "even more than his wonted rudeness and superciliousness," and called him "a presumptuous boy." "When," says Campbell (Life of Lord Loughborough in the Chancellors, vol. 6, p. 47), "the presumptuous boy came to reply, he delivered such a furious personal invective as never was before or since heard at the Scottish bar." Wedderburn's language, reported by Campbell, was an

outrage on decency. "Lord President Craigie, being afterwards asked why he had not sooner interfered, answered; 'Because Wedderburn made all the flesh creep on my bones.' But at last his lordship declared in a firm tone that 'this was language unbecoming an advocate and unbecoming a gentleman.' Wedderburn, now in a state of such excitement as to have lost all sense of decorum and propriety, exclaimed that 'his lordship had said as a judge what he could not justify as a gentleman.' The president appealed to his brethren as to what was fit to be done, unanimously resolved that Mr. Wedderburn should retract his words and make an humble apology, on pain of deprivation. All of a sudden, Wedderburn seemed to have subdued his passion, and put on an air of deliberate coolness, when instead of the expected retractation and apology, he stripped off his gown, and holding it in his hands before the judges, he said: 'My Lords; I neither retract nor apologize, but I will save you the trouble of deprivation. There is my gown, and I will never wear it more—*virtute me involvo.*' He then coolly laid his gown upon the bar, made a low bow to the judges, and before they had recovered from their amazement, he left the court, which he never again entered."

Another Scotchman, who also rose to be Lord Chancellor of England, played a nobler part in his contention with the bench. In 1784 the Dean of St. Asaph was indicted at Shrewsbury for seditious libel, and he was defended by Thomas Erskine. The jury found him "guilty of publishing only." Buller, J.; "If you find him guilty of publishing you must not say the word 'only.'"—Erskine: "By that they mean to find there was no sedition."—Juror; We only find him guilty of publishing. We do not find anything else."—E.: "I beg your lordship's pardon, and with great submission. I am sure I mean nothing that is irregular. I understand they say, 'We only find him guilty of publishing.'"—Juror: "Certainly, that is all we do find."—B.: "If you only attend to what is said, there is no question or doubt."—E.: "Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict."—Jurymen: "Certainly."—B.: "Gentlemen, if you add the word 'only' it will be negativing the innuendoes."—E.: "I desire to know your lordship, sitting here as judge, to record verdict as given by the jury."—B.: "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment."—Juror: "Certainly."—E.: "Is the word 'only' to stand part of the verdict?"—Juror: "Certainly."—E.: "Then I insist it shall be recorded."—B.: "Then the verdict must be misunderstood; let me understand the jury."—E.: "The jury do understand their verdict."—B.: "Sir, I will not be interrupted."—E.: "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded."—B.: "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."—E.: "Your lordship may proceed in what manner

you think fit; I know my duty as well as your lordship knows yours. I shall not alter my conduct.

The verdict was finally entered, "Guilty of publishing, but whether a libel or not we do not find."

Valuable as this precedent is, the comment of Campbell, himself a Judge and Lord Chancellor, is equally precious: "The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. The noble stand for the independence of the bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle no less than its spirit, and the felicitious precision with which he meted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England."

Another hot forensic *mélée* is recorded about 1817 (2 Law and Lawyers, 357). Sergeant Taddy was examining a witness in the Common Pleas, and spoke of the plaintiff "disappearing" from that neighbourhood. Park, J.; "That's a very improper question, and ought not to have been asked."—T.; "That is an imputation to which I will not submit. I am incapable of putting an improper question to a witness."—P. (angrily); "What imputation, sir? I desire that you will not charge me with casting imputations. I say that the question was not properly put, for the expression 'disappear' means 'to leave clandestinely.'"—T.; "I say that it means no such thing."—P.; "I hope that I have some understanding left, and, as far as that goes, the word certainly bore that interpretation, and therefore was improper."—T.; "I never will submit to a rebuke of this kind."—P.; "That is a very improper manner, sir, for a counsel to address the court in."—T.; "And that is a very improper manner for a judge to address a counsel in."—P. (rising, very warmly): "I protest, sir. You will compel me to do what is disagreeable to me."—T.; "Do what you like, my lord."—P. (sitting down): "Well, I hope I shall manifest the indulgence of a Christian judge."—T.: "You may exercise your indulgence or your power in any way your lordship's discretion may suggest, and it is a matter of perfect indifference to me."—P.: "I have the functions of a judge to discharge, and in doing so I must not be reproved in this sort of way."—T.; "And I have a duty to discharge as counsel which I shall discharge as I think proper, without submitting to a rebuke from any quarter." Sergeant Lens was about to interfere. Taddy protested against any interference, but Lens said; "My brother Taddy, my lord has been betrayed into some warmth——" "I protest," said Taddy; "I am quite prepared to answer for my own conduct."—P.: "My brother Lens, sir, has a right to be heard.—T.: "Not on my account; I am fully capable of answering

for myself."—P.; " Has he not a right to possess the court on any subject he pleases ? "—T.: " Not while I am in possession of it, and am examining a witness.". Mr. Justice Park, then seeing evidently that the altercation could not be advisably prolonged, threw himself back into his chair, and was silent.

Lord Brougham mentions a strange scene of which he was a witness, amusing rather than of good example. At Durham (about 1810 ?) a cause was being tried before Baron Wood. " There was heard an undergrowl on the other side from the Sergeant (Cockell), abusing Topping for his insolence and ingratitude, and the Baron for his ignorance and partiality, and calling for his clerk to bring him some of the stomach tincture, which we knew would console him, as it was generally brandy with some water added, to give it a name rather than materially alter its nature." (Works, vol. 4, p. 384.)

Something has been said about Kenealy's case above. As a matter of fact, his utterances in court never formed the subject of inquiry by any professional tribunal, but the important point to notice is that it was his inn, Gray's, which set the Lord Chancellor in motion (on account of his editorship of the Englishman) with the result that he was dispatented, and which disbenched and disbarred him on the same ground.

It will be clear from all the instances that no formula can exactly define to what length of retort or of freedom of speech in addressing a judge counsel may with propriety go. Obviously, a genuine instinct of self-respect will inspire an advocate with the exact measure of what is due to himself, and what is due to his professional superior, just as it will antagonists in any other controversy.

Perhaps the true " rule " may be collected from a dictum attributed to Curran *arguendo.* He offended Judge Robinson, who exclaimed furiously, " Sir, you are forgetting the respect that you owe to the dignity of the judicial character." " Dignity! my lord," said Curran, " upon that point I shall cite you a case from a book of some authority, with which you are perhaps not unacquainted. A poor Scotchman, upon his arrival in London, thinking himself insulted by a stranger, and imagining that he was the stronger man, resolved to resent the affront, and taking off his coat, delivered it to a bystander to hold, but having lost the battle, he turned to resume his garment, when he discovered that he had unfortunately lost that also—that the trustee of his habiliments had decamped during the affray. So, my lord, when the person who is invested with the dignity of the judgment-seat lays it aside for a moment to enter into a disgraceful personal contest, it is vain, when he has been worsted in the encounter, that he seeks to resume it—it is in vain that he endeavors to shelter himself behind an authority which he has abandoned." Robinson exclaimed: "If you say another word, sir, I'll commit you."—" Then, my Lord, it will be the best thing you'll have

committed this year." The judge did not do as he threatened, any more than was done in any of the cases already mentioned, or, indeed, in any recorded; but it is instructive to read that "he applied to his brethren to unfrock the daring advocate," but they refused. The true principle may be deduced from Curran's apologue. So long as a judge speaks in that capacity, be he right or wrong, he is entitled to all respect of demeanor and all courtesy of language. The moment he descends to personalities, invective or criticism not warranted or required by his duty to the court, that is, to the public, he strips himself of his judicial function, and the person aggrieved by his language is entitled to speak to him as man to man, a relation which of course still includes that of gentleman to gentleman.—*The Albany Law Journal.*

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Is the fact that the insured while insane burnt a building a defense to an action on a fire insurance policy.

The question whether it is a defense to an action on a fire insurance policy to allege and prove that the building was burned by the insured while insane, was recently decided in Pennsylvania, in Showalter, *Committee af Eaby* v. *Mutual Insurance Co. of Chester County.* The Superior Court, *Rice*, P. J., held that while the direct burning of the building by the wilful act of the insured was not one of the risks within the contemplation of the parties to the contract, it is equally well settled that mere carelessness and negligence of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy, unless specially excepted. It must not be assumed that what would be a fraudulent act if committed by a sane person is so in a person incapable of fraudulent intent, and of resisting insane impulse. The court adds: "When an insane person burns his own building, what legal wrong does he commit? Certainly none for which he is punishable criminally, and none for which he is responsible civilly, unless it be a breach of duty arising out of a contract. But as well might you say that negligence of the insured is a breach of duty owed to the insurer, as that an insane act is. No rule or principle of public policy forbids one to covenant for indemnity against loss by fire consequent upon either; and why a condition should be implied excepting one, and not the other, from risk, is not plain. The general rule is that a fire policy covers all risks of loss or damage by fire, save only such as are excepted by the terms of the policy, and such as are caused by the voluntary act, assent, procurement or design of the assured himself. In this respect the law of fire insurance seems to be in harmony with the law of life insurance. * * * As in life insurance, if not expressly provided otherwise, the policy covers death by suicide when insane, so also for similar reasons loss by fire occasioned by the negligent or insane act of the insured is one of the risks assumed, unless expressly excepted." The court points out that the act of burning

one's own property does not necessarily injure an insurance company. Whether it does or not depends upon whether the company has, for the time being, assumed the risk of such burning.

In another case the same court lays down the doctrine that a lunatic is civilly liable for loss occasioned by his perpetration of what in a sane person would be a tort or trespass in which wrongful or malicious intent is not an essential element. Accordingly, it was held that where a lunatic intentionally sets fire to the property of another, which is insured, the insurer having paid the loss, may recover the amount of the same from the lunatic. The learned judge, in closing his opinion, says:

"We have not undertaken to cite all the cases bearing upon the question, but, after a somewhat thorough research, we have been able to find no case in which it has been held that the lunacy of the defendant is a defence to an action for the recovery of compensatory damages for a tort in which wrongful or malicious intent is not an essential element. It has been asserted that the rule is, at least in this country, a universal one, that no one can be made liable for injuries to the person or property of another, without some fault or negligence on his part. It is undoubtedly true that the tendency of modern decisions is in that direction, but it is unsafe to say that the rule has no exceptions nor limitations. There are many injuries to which, upon sound principles of public policy, the rule is applicable, that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. Belonging to these classes is the injury to the person or property of another by an insane person, by an act which in a sane person would be a trespass. To apply the last mentioned rule to such a case does not, in the slightest degree, imply punishment of a person who is incapable of wrongful intent; it simply gives compensation to him who has been damaged; it places the loss where the burden more justly belongs:—*The Albany Law Journal.*

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The Chief Justice.

Only seven men have filled the High Office in the United States.

The office of chief justice of the Supreme Court of the United States was established by the Constitution concurrently with the office of president, but while the presidency has been open to all native-born citizens above the age of 35, the office of chief justice of the Supreme Court, bestowed usually upon men of mature, if not advanced years, has been held in fact by seven persons only since the foundation of the government. There has been more than three times as many presidents, says the New York Sun.

John Jay, of New York, was the first chief justice of the Supreme Court. He was appointed by Washington, in 1789. Judge Jay was at

that time only 44 years of age. When he attained the age of 50 he resigned and retired to private life. He died thirty-four years later—in 1829. The second of the Supreme Court justices was John Ellsworth, of Connecticut. He was 54 years of age when appointed, and served until 1801, when he resigned, resignation from public office being somewhat more frequent at that time than now. His successor was John Marshall, of Virginia, who was 46 years of age when he assumed the post by appointment of President John Adams. He held it uninterruptedly for thirty-four years, until his death in 1835.

Andrew Jackson appointed his successor, Roger B. Taney, of Maryland, who held the office until his death, in 1864. Judge Taney was 59 years of age when appointed and 87 at the time of his death. No chief justice of the Supreme Court, perhaps, had more intricate questions to determine or to vote upon in that tribunal than did Judge Taney, and his tenure and that of Chief Justice Marshall stretch over nearly one-half of the history of the United States as a nation. Chief Justice Taney's successor was Salmon P. Chase, of Ohio, who had previously been secretary of the treasury, and was 56 years of age when appointed. He served for nine years, dying in 1873. Mr. Chase was himself a candidate for the presidency, and had hoped to defeat Mr. Lincoln for renomination and to succeed him, and later, in 1868, it is known that Mr. Chase was a candidate for the democratic nomination for the presidency, though he had been one of the founders of the Republican party. Chief Justice Chase was succeeded in 1873 by President Grant's appointment of another Ohio man, Morrison R. Waite, who was 57 years of age when appointed, and served until 1888, when he was succeeded by the present chief justice, Melville W. Fuller, appointed by President Cleveland. Mr. Fuller is a native of Maine. He was, when appointed, 55 years of age, and was 64 on February 11, 1897. He is the seventh of the chief justices of the Supreme Court, and has served thus far a briefer term than any of his predecessors since Chief Justice Ellsworth: —*The Albany Law Journal.*

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A Retiring Executioner:—An event of national importance will shortly take place in France. It is the retirement of M. Diebler, the executioner, who, now that he has guillotined 502 criminals, thinks it high time his successor was appointed. He is 63 years of age, and has been forty years in his country's service. He served his apprenticeship with Roch, his predecessor, assisting in eighty-two executions.—*London Globe.*

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A Mixed Jury:—The jury in a divorce case in South Dakota was composed of six men and six women;—*The Albany Law Journal.*